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# FEDERAL INJUNCTIONS

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## HEARINGS

BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON THE  
JUDICIARY, UNITED STATES SENATE

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ON THE BILL

### S. 3724

A BILL REGULATING INJUNCTIONS AND THE  
PRACTICE OF THE DISTRICT AND CIRCUIT  
COURTS OF THE UNITED STATES



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3724, REGULATING INJUNCTIONS, ETC.

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FEDERAL INJUNCTIONS.

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COMMITTEE ON THE JUDICIARY,  
UNITED STATES SENATE,  
*Thursday, January 27, 1910.*

The subcommittee met at 3 p. m.

Present, Senator Overman.

The following is the bill forming the subject of the hearings:

[S. 3724, Sixty-first Congress, second session.]

A BILL Regulating injunctions and the practice of the district and circuit courts of  
the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no temporary or interlocutory injunction or temporary restraining order, or decree suspending or restraining the enforcement, operation, or execution of any statute of any State by restraining the action of any officer of such State in the enforcement or execution of such statute shall be issued or granted by any circuit or district court of the United States or by any judge or justice thereof upon the ground of unconstitutionality of the statute, unless the application for the same shall be presented to a circuit judge and shall be heard and determined, upon issue made and proof taken by affidavit or otherwise, by three judges, of whom two shall be circuit judges, and the third may be either a circuit or a district judge, and unless a majority of said three judges shall concur in granting such application. Whenever such application, as aforesaid, is presented to a circuit judge he shall immediately call to his assistance, to hear and determine the application, one circuit judge and one district judge or another circuit judge. Said application shall not be heard and determined until five days' notice of the hearing has been given to the governor and attorney-general of the State and such other persons as may be defendants in the suit: *Provided*, That if a majority of said judges are of the opinion, at the time notice of said hearing is given as aforesaid, that irreparable loss and damage would result to the applicant unless a temporary restraining order, pending the period of the required notice, is granted, a

majority of said judges may grant such order, but the same shall only remain in force until the hearing and determination of the application, upon due notice as aforesaid, has taken place. That an appeal may be taken directly to the Supreme Court of the United States from any order or decree granting or denying, after notice and hearing, a temporary or interlocutory injunction or restraining order in such case, and the hearing of such appeal shall take precedence over all other cases except those of a similar character and criminal cases.

#### ARGUMENT OF ALFRED P. THOM, ESQ., OF WASHINGTON, D. C.

Mr. THOM. Before proceeding to discuss the special features of this injunction bill I should like to have the opportunity to advert to some of the considerations which seem to me to affect the wisdom, from a national standpoint, of any legislation whatever on this subject. It seems to me that there are certain fundamental objections to any legislation of this character.

The underlying theory of such legislation as is proposed in this bill must be that the National Government is, in a sense, foreign to the States. The bill proceeds upon the theory that it is necessary to have some special restrictions put upon the national power when it goes to dealing with these state questions. For example, a single federal judge can issue an interlocutory injunction against and can declare unconstitutional an act of Congress if contrary to the Constitution of the United States, and a single state judge can issue an interlocutory injunction against and can declare unconstitutional the act of a State if contrary either to the constitution of the State or to the Constitution of the United States.

Senator OVERMAN. There is no conflict between a national judge issuing an injunction and a state judge issuing an injunction. There can be none. I would like to hear you as to any conflict between the two jurisdictions.

Mr. THOM. That is not what I am trying to show.

Senator OVERMAN. Pardon me for the interruption. Proceed in your own way.

Mr. THOM. What I am trying to show to your honor is that this is a discrimination against the National Government in favor of the state government, and against the national court in favor of the state court.

As bearing out that contention I call your honor's attention to this; a single federal judge can enjoin and declare unconstitutional an act of Congress, a single state judge can enjoin and declare unconstitutional an act of a State, as contrary to the Constitution either of the State or of the United States; but when it comes to a federal judge enjoining by interlocutory order an act of a State as contrary to the Constitution of the United States—a thing that a single state judge can do—it is proposed in this bill that that shall not be done except by three federal judges.

On its face that is a discrimination against the national judiciary in favor of the state judiciary. It puts a restriction upon the power of a national judge that is not upon the power of a state judge.

Now, what is the reason of this? What has forced any mind to the conclusion that it is proper? It can only be justified by the idea that

the National Government is related to the people of the State and to their affairs in a different way from the way in which a state government is related to the people of a State and their affairs. In other words, as I started out to say, it is based upon the thought that in a sense the Federal Government is a foreign government as respects the people of the State and their laws.

Now, is it a wise thing, if your honor please, for Congress to do—to give way to such an idea for a moment? The Constitution of the United States declares that the Constitution of the Union and the laws made in pursuance thereof shall be the supreme law of the land, anything in the laws of a State to the contrary notwithstanding.

It seems to me that, in all the controversies that have given rise to this matter, there has been a great confusion of thought in respect to what constitutes the law of a State.

Your honor is a Senator from North Carolina. I was counsel in a case which we both have in mind, in North Carolina; and you are aware that the opponents of the jurisdiction of the federal court in that case were constantly talking about the obligation upon the governor of the State to enforce the laws of the State. You remember publications in which the governor of the State declared that it was his sworn duty to enforce the laws of the State, and you remember, further, that he interpreted the laws of the State to be those written upon the statute books of the State.

It seems to me that such a view is most hurtful and pernicious, if this dual system of government is to continue. It is manifest to any lawyer that not only are the laws of a State not necessarily all to be found in the statute books of the State, but that, if those statutes are contrary to the Constitution of the United States, they are not the law at all, but the Constitution is the law of the State, and the oath of the executive refers to his carrying out and making effective the Constitution of the United States, not the void law of the particular State of which he may be the executive.

Now, can Congress with any wisdom, in dealing with a subject so large as this, touching, as it does, the real relationship between the States and the Nation, and affecting the very integrity of our institutions—can it, I say, with any wisdom give color to the thought that the judiciary of the United States, or that the Constitution of the United States, is in any sense foreign to the States? Can it permit a discrimination against the national judiciary in favor of the state judiciary? Can it, with any regard for the continuance of a true conception on the part of our people of the proper relationship of our Constitution and laws, write into the national statute book a provision requiring that three judges of the Union are required to do what one judge of a State may do?

I have been for many years impressed with what was said by the Supreme Court of the United States, speaking through Justice Bradley in the *Siebold* case, in regard to the true relation of the States to the Union, and in regard to the misconception which permitted a jealousy to grow up on the part of the people of a State against the just powers of the Union.

I quote from what Judge Bradley said in that case:

“The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard to the relations which subsist between the state and national governments. It seems to be often over-

- looked that a National Constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things, and which, moreover is, or should be, as dear to every American citizen as his state government is. Whenever the true conception of the nature of this Government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the state governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised toward this Government in reference to the preservation of our liberties than is proper to be exercised toward the state governments.

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“This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same place. The one does not exclude the other, except where both can not be executed at the same time. In that case the words of the Constitution itself show which is to yield. ‘This Constitution, and all laws which shall be made in pursuance thereof, \* \* \* shall be the supreme law of the land.’

\* \* \* \* \*

“If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the National Government out of the United States and relegate it to the District of Columbia or perhaps to some foreign soil.” (Ex parte Siebold, 100 U. S., 393.)

Sitting here as a part of the National Government, clothed with the duty to see that the just balance of powers between the State and the nation is preserved—having upon you and your associates the high duty of maintaining the proposition that the government of these United States is not foreign to the States, but is, or ought to be, as dear to them as the governments of their States—can Congress in wisdom adopt any law the underlying motive of which is distrust by the States of the just power of the National Government and the necessary effect of which is to establish a discrimination to the disadvantage of the National Government, in favor of the State, and to the disadvantage of the national judiciary in favor of the State judiciary?

In other words, I wish at the outset of this discussion to bring to your attention the fundamental consideration that the very conception underlying this bill strikes at a just view of the relations of the state and national governments, and is born of the thought that you must put restrictions upon the National Government, where a State is concerned, in order to protect the States from tyranny and abuse.

If Congress says that, what does it invite the people of the United States to think in regard to their National Government? If that view is indorsed by Congress in its legislation—if it gives way for one moment to the thought that the National Government is foreign to the State, and is tyrannical, and must have restrictions put upon it in order to prevent abuse, what will be the conclusion of the people of the United States who are accustomed to follow the leadership of Congress, and what will then become of their conception of the relations of their National Government to them?

The foregoing is the first fundamental objection to which I invite your honor's attention. I now invite your attention to a second.

The proposed statute is intended to provide only for a case where a citizen or a party to a cause, helpless because in the minority, desires to claim the protection of the Constitution of the United States as to his life, his liberty, or his property rights.

In any fair system of government, ought it to be hard or easy for one of the helpless minority to secure the protection of the constitution and laws of his country?

This bill proposes to make it difficult. As difficult as it is in the circuit to which your honor and I both belong, as I will illustrate in a moment, in some sections of the United States the provisions of this bill would, as I am told, make the securing of constitutional protection absolutely impossible. Let us take the circuit to which you and I belong—the fourth circuit. There are in the fourth circuit two circuit judges now. There have been only two in all its history. One of those circuit judges, as your honor well knows, has been in bad health, or was in bad health for over one year, and was not available either to take action on an injunction or for the trial of cases in court. That is liable to happen at any time; and yet, if two circuit judges are to be necessary for an interlocutory injunction, what would happen to a citizen, or to those parties not citizens, whose property rights are involved, when there is only one circuit judge available?

I am told by Senator Long—and I may say that he will no doubt discuss that point more fully than I am doing, and I refer to it only to illustrate what I am now saying—that in his section of the country it will take a trip of 2,000 miles to get to a circuit judge, and after such a journey he can get to only one.

But even if an applicant could get to all of them, when we consider that it is made necessary to have the three together, that there may be a great number of litigants demanding their attention, that they may have some obligation to the United States in the trial of matters given precedence under the laws, such as matters arising under the Sherman Act, and that they may be in the actual trial of the case—in other words, that they may be in the discharge at the time of some actual and paramount duty which they can not leave—when we consider all these things, we see how difficult it is made by this bill for a suitor to obtain the protection of the constitution of his country.

Let me illustrate what this means: Your honor recollects very well, I presume, the terms of a statute which, reducing to an arbitrary amount the charges of a carrier, made it a crime for any individual in the employment of the carrier to sell a ticket at any rate in excess of the one fixed by the statute. To the carrier there were property rights involved; to every employee of the carrier there were rights of liberty involved.

Your honor will also recollect how an employee of that carrier, selling tickets under the protection of an order of the United States court, at an amount fixed and authorized by that order, was put in jail and sentenced to servitude.

Senator OVERMAN. If there had been two judges to pass on the constitutionality of that act, do you think that that would occur?

Mr. THOM. If you will permit me to pursue my point, I will come to your question later.

Senator OVERMAN. Pardon me for interrupting.

Mr. THOM. The only way to protect that man in his rights as a citizen, the only way to preserve that company from the loss of its property, was by an order of a court.

Ought it, under those circumstances, to be hard or easy to get that order? Is there any national interest that would be promoted by making it hard? Is there any interest of justice that would not be violated if it were not reasonably easy?

Now suppose that in that condition of affairs it had been necessary to convene a court that was inaccessible, that was engaged about other matters, that must consist of three judges, and could not, or would not, come together, would it have been possible to have meted out protection to the liberty of the army of employees whose liberties were threatened, and to have protected the rights that, according to the decision of the Supreme Court later made in that same case, were being taken away by that unconstitutional statute?

I refer now merely to this feature of the situation so as to get my thoughts together on that subject. I will come a little later to the arguments which I shall present in respect to the suggestion involved in your question.

Suppose it is made easy, I mean reasonably easy. Suppose it is left as it is. In other words, suppose we leave in the single national judge, the same power and the same jurisdiction that is placed by the respective States in single judges elected or appointed by them. Then, what is the situation?

If the complainant is right in his contention, all he can get is what the constitution of his country gives him; he can not get any more, even if he is right. If the injunction can not be obtained by him because of obstructions in the law, what is his situation? The situation as to the individual is that he is put in prison. The situation as to the property owner is that he irrevocably loses his property until there is a final decision of his case and a final injunction. If it is made so difficult that he can not obtain an interlocutory injunction or a temporary restraining order, who is going to pay the property owner for the loss of his property? The national Constitution says that his property shall not be taken away from him without just compensation. But, by reason of having made access to the court difficult, his property has been taken away from him for the period between the time the unconstitutional law goes into effect and the final hearing of the case. Where does he get back the constitutional rights which have been denied him by the difficulties that have been thrown in his way by the law? Is there any way of restoring to the individual who has been put in prison the reputation of never having violated the law? Is there any way of taking away from him the time that he has spent in imprisonment? Is there any way of giving back to the man who has invested his money in the property the legitimate use of it during the time that that legitimate use has been denied by an unconstitutional statute? Is there any way of dealing with him in a way to give him protection—to give him the benefit of the Constitution, which is the supreme law of this land?

But, on the other hand, suppose he were to get an injunction that should be finally dissolved as having been wrongfully issued, has there not been devised a way, by an easy evolution of well-understood chancery practice, of giving back to the people who have suffered what they have wrongfully been required to pay? If it is said, on account of the large number of these people, on account of the smallness of the amounts involved in each case, that that is not entirely adequate protection to them, yet compare that protection to the individual that has risked nothing with the absolute lack of protection to the people who have invested in and have established the transportation facilities and to the individual who has risked his liberty in order to carry out his obligations and to exercise his constitutional rights.

The bond is at least some protection to the man who has been overcharged by a railroad, if it should be determined that the injunction was improperly awarded, whereas there is no protection for the complainant in the event he is right in his contention and that the State has unjustly attempted to take away from him his property.

But there is another consideration, it seems to me, which ought to be potential in this connection. Here is a property owner, or an individual in the employment of a property owner, that has been enjoying certain rights in respect of that property from time immemorial. The property has been created at somebody's expense. The property has been operated likewise at private expense. Now the public undertake to take away a part of the use of it, on the ground that, in the legislative mind, the compensation for it is excessive.

It is a use that has been acquiesced in for years, we will say. It is a matter on which there has been and always is ground for legitimate difference of opinion. Now the State asserts a right to invade that property right. Is it a hardship on a State under those circumstances, when it is not in a position to make good any loss that an erroneous conception may bring about; is it a hardship that before it shall take this property a reasonable time shall be permitted to make a judicial inquiry into the controversy as to whether or not it is a legitimate invasion of private rights.

For the public to oppress the individual is easy. For the public to invade property rights is easy. There is no quicker way of firing the popular mind than to inveigh against property rights. Now is it too much to ask, in a just system of law, that before that property right is invaded a reasonable time shall be permitted to make a just and fair inquiry into the merits of the respective contentions?

That reasonable time is during the progress of the case. If at the end of a case, properly expedited by a conscientious judge, it is determined that the State is right, has the State been subjected to any improper hardship in being required to go through that judicial inquiry to see whether or not its *ex parte* view of the matter is right, or the *ex parte* view of the person whose property is taken is right.

In other words, is there any necessity of engrafting upon our laws a means of enforcing the *ex parte* view of the State or the public, in respect to somebody else's property, without permitting a fair opportunity for an examination of the claim of power?

The whole theory on which public sentiment has been stirred up in respect to this matter is that it is unpatriotic and improper on the

part of the property owner to deny the right of the State to take his property at once without inquiry. The property owner becomes unpopular because he will not permit, without an inquiry before an established legal tribunal, the State to take his property at once. Is that a fair and just conception to be encouraged by a system of law? Ought that idea to be crystallized into the statutes? And if it should not be crystallized into the statutes ought not the minority man, the man against whom the majority are attempting to exercise this power, the helpless man, ought he to have his way to the ascertainment and declaration of his constitutional rights made easy or difficult?

The third consideration of a general nature against this bill is that it is in reality, while not, of course, so intended, a reflection upon a very honorable department of the National Government—upon the district and the circuit courts. As I have said, you take from them the power that you concede to the judge of the state court. You say that you can not trust the national judiciary to do a thing unless three judges concur which one judge of a State is permitted to do.

Is there anything in the history of the national judiciary which makes that proper? Is there anything in the history of our jurisprudence which justifies that view? What has been the fate of injunctions that have been granted by the single federal judge? Has the power which the single federal judge exercised been discredited by judicial inquiry, or has it been upheld? What do the records of the Supreme Court show in reference to the injunctions that have been granted by the single federal judge? Without going into the details, which I shall leave to others, I say that, with the exception of the Consolidated Gas case and of the Knoxville Water case, there are no cases that I remember in which the exercise of the jurisdiction in these special matters of rates, even by a single judge, has not been indorsed and upheld upon final inquiry in the Supreme Court of the United States.

Whether I am accurate or not in my recollection of the decisions (and I have had no time to make an exhaustive examination), I am sure I am not mistaken when I say that there is nothing in the history of these injunctions which indicates an abuse of power by the single federal judge.

Now let us look at what, on the contrary, has been the record of the States in respect to the invasion of rights of persons secured by the Constitution of the United States.

In the first place the States have asserted a right to regulate interstate rates—decided against in the Wabash case in 118 United States.

Suppose that a railroad company had asserted such an erroneous proposition of power as that. How great a misconception of its purpose, how great a criticism of its motives, would have gone out! And yet, here was a State earnestly, vigorously, passionately insisting that it had a right to invade the constitutional province of the United States and regulate the interstate rates of a carrier. That is one instance of where the States have attempted to invade the constitutional rights of the carrier.

The States, in the same instance, and in many others, have asserted and have attempted to sustain the proposition that, by the mere vote of the legislative branch of the Government, they can take away the property rights of a person, that the matter of the regulating of charges for the use of property is a legislative matter, and that there

was no constitutional provision which would protect the carrier in the right to make a reasonable charge for the use of his property. States have attempted this, and it was decided against in the case I have cited, the Wabash case in 118 United States.

As involved in that proposition, the State has denied the right of a property owner to the reasonable use of his property, to have the question judicially determined. In other words, they have claimed that their power to confiscate by legislative action was without any restriction, and the property owner was without any protection, although the Constitution of the United States might be, in fact, violated; they have claimed that there was no remedy. And that was decided against in the case I have cited and in other cases.

Failing in the effort to prevent a judicial review directly, the States have attempted to prevent a judicial review, and to nullify the protection of the Constitution of the United States, by inflicting enormous penalties upon the mere application to a court for constitutional protection. So much so, that if there were a mistake on the part of the railroad, or the property owner, in respect to the simple proposition upon which men may have different views—that is, as to what was a just use of its property—as to proper rates, he should be destroyed by the millions of dollars of penalties to which he would be subjected, and thereby deterred from asserting his constitutional right to protection.

This was decided against in the Minnesota and North Carolina case, in 209 United States Reports.

Again, the States have attempted to take advantage of a federal statute to enable them to invade the constitutional rights of a property owner.

Section 720 of the Revised Statutes of the United States provides that no injunction shall be issued by a court of the United States to stay any proceedings in a state court. My State, Virginia, attempted to escape the restraining arm of the Constitution of the United States by declaring the rate-making body a court, and thus attempted to put it beyond the reach of the constituted tribunal for enforcing the constitutional rights under the Constitution of the United States.

This was decided against in the Virginia Passenger Rate case (211 U. S.).

In many instances the States have passed laws confiscating the property of carriers, as in the Reagan case (154 U. S.) and in the Smythe v. Ames case (169 U. S.).

One State that I have in mind has declared that it shall be the duty of the carrier to carry forward the internal commerce of that State—freight commerce, I mean—at a rate of speed which is about double the rate that the commerce of the United States moves at. That State requires that the carrier shall carry forward the State's internal freight commerce at least 50 miles a day instead of the average rate of movement of freight commerce of 24 or 25 miles a day. In other words, it has declared that a preferential movement shall be given to the traffic of that State over the traffic of its sister States and over interstate traffic.

Another State has declared that if a car is not furnished for the commerce of that State a certain time after demand there shall be a penalty of \$25 a day. A sister State says that for a similar failure within its territorial jurisdiction there shall be a penalty of \$1 a

day. The rolling stock of the company, although adequate, may, by the necessities of commerce, have been carried to some remote part of the line, in other and distant States, and it may be impossible to furnish both of those States with all that is demanded, but in one State there is a fine of \$25 a day and in the other a fine of \$1 a day. In case of incapacity to comply with the demands of both, the demand backed by the highest penalty naturally would be given preference. In other words, one State is demanding a preference over the commerce of the other State and over interstate commerce.

Some of the States have passed laws, forfeiting the right of a company to remain in the State, if it brings its suits in the United States court, or if it removes a case to the United States court.

These are some of the things that the States have tried to do. They are some of the violations of the Constitution of the United States that the States have attempted. Compare what has been attempted in the denial of constitutional protection to these rights of property by actions of the States with the honorable record, shown by the reports of the Supreme Court of the United States, of the single judges, district and circuit, of the United States courts. Where can the student of jurisprudence point to the wrong that has been inflicted by these judges in the awarding and in the use of the process of injunction, and how can a student of jurisprudence avoid the conclusion that there is not only an imaginary but a real wrong to be remedied, indicated by the recent history of invasions of sacred constitutional rights by action of the States?

Now, under these circumstances, has a situation arisen where the great power of national legislation should be directed against the honorable record of the federal judiciary, in order to make it difficult for the people of these United States to obtain protection for their constitutional rights?

Another fundamental objection to legislation on this subject seems to me to be found in the special hardships that would be visited upon railroad companies, if it were made difficult or impossible for them to prevent the going into effect of unconstitutional laws. Most of these laws relate to rates—to charges for the use of property.

Let us stop for a moment to consider what is necessary to one of these great public-service corporations in adjusting themselves to a new regulation in respect to their charges. Can they do it at a moment's warning or at a small expense, or does it require an entire readjustment of their tariffs and a readjustment of their instructions for carrying on their business? Let us suppose that a statute, conceded for the moment to be unconstitutional, should require a reduction in their charges. Suppose that by virtue of the difficulty of obtaining a hearing they can obtain no injunction against this unconstitutional statute being put into effect. What must they do? What is the practical situation in which they find themselves? They must figure out the basis of charge on the new basis, between every two stations on their lines involved in the law. They must reduce that to the form of a printed tariff. They must issue instructions as to putting it into effect. But that is not all they must do. Inasmuch as practically every interstate rate is made on a combination of the rate to a certain point, plus the local beyond, they must readjust their interstate tariffs. And all because they can not get a hearing because of the practical and physical difficulty of getting the court together—all because justice is made hard to them.

In the case supposed, they would not only have to go to this expense, to this trouble, to this readjustment of all their matters, but, as heretofore indicated in my argument, they must lose the amount of the reduction, not only on the intrastate business, but on all the interstate business involved in the combination of locals. And it is left in a way that it is not in the power of this Government to restore to them the amount lost and taken illegally from them—to give them back the protection of the Constitution of the country, which they were promised and which is a part of the social compact of the Union, and on the faith of which we entered into the national family relationship. The protection of the Constitution should be sacred and is the right of all.

There seems to me also to be another fundamental difficulty that is lost sight of if protection in respect to constitutional rights is made either uncertain or difficult, and perhaps this, in relation to the national interests, is as great as, if not greater than, any that I have mentioned. The system of transportation in this country to-day is carried on by private ownership. No law can be passed to make the individual invest his money in anything. If he is to invest, he must be attracted to the investment in some way. He must not be repelled from it by the character of the laws which govern his property. If he is not safe in his investment he will not make it. If he will not make it, then the facilities for the transportation of the country must halt and can not keep pace with the development of its commerce, or the system must perish and the work be taken up anew by other hands.

If, therefore, when a man invests his money in one of these institutions, he can not get constitutional protection because of the difficulties which a law throws in his path, it will not be long before he will decline to make the investment.

I suppose that few people understand the responsibilities and the problems of the railroad manager of to-day. He must not only meet the demands of the public, but, while meeting them, he must make attractive to the people who can build up the facilities which he is managing the investment of their means in that kind of industry. He must try to satisfy the growing requirements of the public on the one hand, and he must, on the other, show to the person on whom he is dependent for the facilities which he must provide that the investment would be as safe in that line of business, and as certain of constitutional protection, as if the investment is made in some other line.

Now, we have already reached this situation. If you own a piece of property other than the property of a carrier, you ascertain its value by capitalizing its legitimate earning capacity. That economic principle is being reversed in the public mind as to the business of carriers, and you ascertain their legitimate earning capacity by arbitrarily fixing the value of their property. How long are we going to be able to survive that economic mistake? How long are the people of this country going to be willing to invest their means in a class of property that first has its value fixed arbitrarily and then its earning capacity measured by the figures thus established, when they can invest in other classes of property and have the value grow with the legitimate earning capacity?

Suppose we add to all this a difficulty in obtaining constitutional protection even within the narrow lines of values thus arbitrarily established. Suppose we make it hard for the investor—suppose at times

and in some sections of this country we make it impossible for him—to obtain the protection of the courts in the declaration and enforcement of his constitutional rights: how long would it be before the system of private ownership is definitely, if not fatally, weakened?

I refer, may it please your honor, to these considerations as relating to the wisdom of changing the time-honored powers of our federal judiciary. It does seem to me that the mere fact that there was a popular agitation on this subject two years ago ought not to commit us to such a grave mistake in governmental principle. These popular waves of irritation and agitation quickly rise and quickly subside. I can remember the time, and perhaps your honor can remember it also, when, at the high tide of this agitation to which I allude, the leaders of it could have been elected to anything within the gift of the people. Your honor recollects how quickly that subsided and how it became impossible to elect them to anything. Now, shall we take from that agitation, so quickly subsided—so quickly rejected by the good sense and sense of patriotism of the people—a reformation of methods which would result in weakening protection to the just rights of those, who, in that very case, have been, by the Supreme Court of the United States, decided to have been merely asking for what was their just due under the Constitution of the United States?

Your honor asked, a moment ago, whether or not a good answer to such an agitation would not be to require that three judges shall concur, and I fancy that that is at the bottom of the thought of your honor in favoring this system of legislation. What I believe to be in your honor's mind is the attempt to meet in some legitimate way the conditions that may arise out of such an agitation, in a way to preserve the public peace. And it is an honorable ambition. But can we say that it is a correct, that it is a just, solution of the difficulty, when it involves a discrimination by the Government against the federal judiciary in favor of the state judiciary, when it involves a giving way to an unjust demand and an unjust conception on the part of the people of a State of their relations to the supreme law of their land? Do we not sacrifice more by yielding to this reproach upon the federal judiciary than we would do if we insisted that the National Government is as much to be respected as a state government within its just constitutional limitations, and educate the people of the States up to a recognition of the just powers, as historic as the Union, of the judges of the Union? Shall we give way to these temporary views of the situation, that were rejected by the people themselves before the end of the calendar year in which the agitation arose? Shall we change our institutions for the purpose of meeting a condition so unreasonable and so temporary, or shall we still maintain our institutions firm and strong, as they have been maintained during the one hundred and thirty years of our national life, and throw the influence of the leadership of Congress in favor of a just and affectionate recognition of the relations of the Union to the people of the States?

It seems to me that if we take the step now proposed we will be sacrificing the substance of right government and of justice in order to meet a situation which the people themselves, as soon as they are left time to think, appreciate—we will be adjusting our institutions

to meet a temporary frenzy, and will be sacrificing the reverence and the honor that we owe to institutions that have stood the strain of more than a century.

Coming now to the provisions of this bill, and discussing the subject from the standpoint of some legislation on the subject, which, from the argument I have already made, you will see that I deplore, but considering the matter from the standpoint that possibly the wisdom of Congress may conclude that there should be some legislation on this subject, it seems to me that in the bill as proposed there are certain difficulties which it is not necessary, in any aspect of the case, to insist upon. Your honor has already alluded to that provision which prevents the issuing of an injunction except after issue made, and you have conceded that to insist on that would be unwise.

Senator OVERMAN. Yes; that appealed to me.

Mr. THOM. Your honor has recognized that that would put it into the power of a defendant to postpone the application for an injunction until the defendant had time to make up the issues. I shall assume that it is not necessary to mention this provision of the bill further.

Senator OVERMAN. I should like you to state it.

Mr. LONG. What part of the bill is it?

Senator OVERMAN. In line 12; the idea is to strike out the words "issue made."

Mr. EMORY. What words are to be stricken out there?

Mr. THOM. The words "issue made" are to be stricken out.

Senator OVERMAN. Instead of reading "upon issue made and," it will simply say "upon proof taken."

Mr. THOM. I will present a brief draft of the amendments I shall suggest, including that.

Senator OVERMAN. We shall be glad to have it.

Mr. THOM. There are, it seems to me, certain fundamental objections to the scheme of this bill. The scheme of it is that the application for an injunction must be made to a circuit judge.

Senator OVERMAN. I want to say that this bill is not the bill as prepared by me. This is a bill that is a substitute for a bill that I introduced.

Mr. THOM. That I understood, but this is the only bill that we can deal with now.

Mr. LONG. This bill is as it was reported from the committee?

Senator OVERMAN. As the committee bill.

Mr. LONG. And is now pending on the Senate Calendar?

Senator OVERMAN. The facts are that I introduced a bill during the last Congress. The committee prepared a substitute for it; that went to the Senate and passed the Senate. Then when the next Congress came in I introduced the committee's bill as my bill. This is the bill of the committee.

Mr. LONG. The same that was reported by the committee during the last Congress?

Senator OVERMAN. Yes. This is the substitute for my bill introduced during the last Congress. In this Congress I have introduced this bill (the committee bill) as my bill.

Mr. THOM. Now, referring to this bill before us (S. 3724, 61st Cong., 2d sess.), it seems to me that the purpose of the bill is fully met by requiring that there shall be three judges to hear and determine the

motion for an interlocutory injunction after notice to the governor and attorney-general of the State. It does not seem to me that it should be necessary to exclude a justice of the Supreme Court of the United States, nor does it seem to me that it should be necessary to exclude a district judge of the United States acting as a circuit judge.

It is well known in some parts of the country that the circuit courts are almost entirely held by district judges. There is a good reason for it. The present judicial system of the United States provides for a district court, a circuit court, a circuit court of appeals, and the Supreme Court of the United States. If the circuit judge was constantly holding a circuit court and deciding cases, he would be incapacitating himself for sitting in these cases on the circuit court of appeals. And the greater the extent to which he sits in the circuit court the greater would be his incapacity for the circuit court of appeals. We would thus have the curious situation that the circuit court judge, who is officially superior to the district judge, would have the appeal from him heard by a court of district judges, because he would be incapacitated. That would be universally so where there is but one circuit judge. And where there are only two circuit judges, as in the case of your circuit, we would have a circuit court of appeals on an appeal from a circuit judge held by one circuit judge and two district judges.

Now, to avoid that anomaly it has become the practice of the circuit judges of the United States to hold themselves for circuit court of appeals duty just so far as the performance of their public obligations will permit.

That is the case everywhere I know in the United States.

But I am told this is especially the case in those circuits where it would involve 2,000 miles of travel, as in the eighth circuit, for a circuit judge to hold a circuit court.

Now, although the district judges, sitting either as district or as circuit judges, have power to pass upon all the rights of liberty and life of a citizen, so far as within the jurisdiction of the United States, and, sitting in the circuit court, have power to pass upon every right of property not involved in the class proposed to be made exceptional in this bill, the policy announced by this bill is to make these judges incapable, except as a minority of the court, from considering any question relating to these interlocutory injunctions.

That is making justice almost impossible in some cases. In some parts of the country it is making it wholly impossible. You may not be able to get to the circuit judge, when a trip of 2,000 miles is involved, and in many other cases, in time to set machinery in motion which will act sufficiently early to protect the interests of the litigant.

Therefore, I think a just objection to this bill is that it strikes down the district judge sitting as a circuit judge, and there ought to be an amendment, the nature of which I will suggest in a moment, constituting the board of judges differently.

Senator OVERMAN. I will say at this point that I have a letter from the Attorney-General on the subject of this bill, which I will read. It is as follows:

DEPARTMENT OF JUSTICE,  
OFFICE OF THE ATTORNEY-GENERAL,  
Washington, D. C., January 22, 1910.

HON. LEE S. OVERMAN,  
*United States Senate.*

MY DEAR SENATOR: My attention has been called to Senate bill 3724, introduced by you and reported from the Judiciary Committee, being a bill "regulating injunctions and the practice of the district and circuit courts of the United States." I would suggest that this should be modified so as to permit the application to be presented to a district judge, and the proceedings which are required to be heard before three circuit judges to be allowable before any three judges, district or circuit of the circuit in which the cause is pending. It is sometimes impossible to get at a circuit judge within the time which is available for the purpose of making such applications as are dealt with in this bill. Take the eighth circuit, for example. The circuit judges in that circuit are for the greater part of the year engaged in holding the court of appeals either in St. Paul or St. Louis, with only a short session in Denver. Now, if a case should arise making it proper to procure such an injunction as the bill refers to in North Dakota, for example, you can readily see how burdensome it would be to put upon the suitor the necessity of finding a circuit judge; that is, of going to either St. Paul or St. Louis for the purpose, and when it came to the hearing which, by your bill, is to be conducted by three judges, two of whom shall be circuit judges, such hearing would probably have to take place either in St. Paul or St. Louis, because the circuit judges would be occupied there in appellate court work. These are practical considerations which are of such moment that I venture to direct your attention to them.

I would suggest, also, that the bill should contain an exception of pending cases, so that it would not operate to, in effect, vacate an injunction obtained, or a case in which a temporary restraining order has been obtained, with a motion for an injunction pendente lite made returnable when the act should take effect.

Faithfully yours,

GEO. W. WICKERSHAM,  
*Attorney-General.*

MR. THOM. Another very obvious objection, if the construction which justifies it is the true construction of the act, is the prohibition upon any district judge sitting as a circuit judge to enter a final decree in the injunction case. The word "decree" is used in the fourth line of the bill. If it means the same thing as "order" it is superfluous. If it means (as construed in some sections of the country) a final decree, then, after the court has given an interlocutory injunction, there is no way for the district judge to go on and deal with the remaining features of the case.

But it seems to me that a more fundamental and serious objection is the requirement that there shall be no temporary restraining order unless granted by two of these judges; that by this requirement you make a temporary restraining order almost impossible. Some people construe this bill, and some of the best lawyers that I know construe it, as requiring those two judges to be together.

SENATOR OVERMAN. I do not see that.

Mr. THOM. That is a construction that is put upon it by some of the very best lawyers that I know.

Senator OVERMAN. I do not think that that was the intention.

Mr. THOM. Their views would help to shape my conclusion in respect to it, even though I were inclined to think differently on that point.

Senator OVERMAN. There ought not to be any doubt about it.

Mr. THOM. There ought not to be any doubt about it, at any rate. But even if it is not necessary for the two judges to be together, in order to grant the temporary restraining order, what, until the three can get together, is the reason for requiring a litigant to travel thousands of miles from one judge to another, in order to have the status quo maintained until the three judges of the United States court can get together to hear the application for the interlocutory injunction?

Senator OVERMAN. Have you an amendment with you?

Mr. THOM. Yes.

Senator OVERMAN. What time do you give?

Mr. THOM. I have not limited the time, but I have expedited the hearing by this board of three judges, practically doing the same thing, in regard to that, that is done in the expediting act of 1903.

Senator OVERMAN. That has the same provision, requiring three judges to hear the question. Does not that provide more than two judges?

Mr. LONG. Yes; in suits in which the United States is complainant.

Senator OVERMAN. That is as I understand it.

Mr. THOM. I have added a suggestion, the same as the expediting provision, *mutatis mutandis*, that is contained in that act. That act requires a certificate from the Attorney-General that the expediting is desirable. That is not in my proposed draft for the reason that the Attorney-General has no interest in the matters covered by this bill, but this draft requires that the hearing shall be expedited in the same way that that act insures expedition after the certificate of the Attorney-General is given.

I hope very much that Congress, if it passes this law at all, will see the justice of not creating this hardship in the way of getting a temporary restraining order.

Senator OVERMAN. Your idea is that there would be much time consumed in going before the three judges to get the restraining order?

Mr. THOM. Yes, sir—and more. The whole theory of Congress from the foundation of this Government has been to bring justice to the litigant's door.

Senator OVERMAN. That is true.

Mr. THOM. Now, why reverse that, and require us not only not to have it at our door, but to be obliged to travel thousands of miles before we can get a hearing upon the merits of the motion?

Senator OVERMAN. Will you leave us your suggested bill?

Mr. THOM. I will leave it for the record, but I want to read it to you first. If you follow my reading, with the committee's bill before you, you will observe what changes are made [reading]:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no interlocutory injunction suspending or restraining the enforcement, operation, or*

execution of any statute of a State, by restraining the action of any officer of such State in the enforcement or execution of such statute, shall be issued or granted by any justice of the Supreme Court, or by any circuit court of the United States or by any judge thereof, or by any district judge acting as circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit judge, or to a district judge acting as circuit judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court of the United States, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court of the United States or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney-general of the State and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court of the United States, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall only remain in force until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case; and the hearing of such appeal shall take precedence over all other cases except those of a similar character and criminal cases."

Mr. THOM. I now submit the matter to the committee, so far as I am concerned.

Senator OVERMAN. I am very glad to have heard you on the bill. I am confident that no member of the committee wishes to clog or delay justice in the matter. It was intended to remove all prejudice against the federal court. That was the motive that actuated the committee. The idea was that if as many as two or three judges would declare an act to be unconstitutional the people would be perfectly satisfied, whereas if done by only one judge it would be a case of one judge as against another judge, as was the case in North Carolina.

Mr. LATHROP. It is now 5 o'clock and I should be glad to postpone until to-morrow the remarks that I desire to make.

Senator OVERMAN. Then we will adjourn the hearing until to-morrow at 3 o'clock.

(The subcommittee then adjourned until to-morrow, Friday, January 28, at 3 p. m.)

COMMITTEE ON THE JUDICIARY, U. S. SENATE,  
*Friday, January 28, 1910.*

The committee met at 3 p. m. Present, Senator Overman.

**ARGUMENT OF GARDINER LATHROP, ESQ., OF CHICAGO, ILL.**

MR. LATHROP. I want to say in opening that the thanks of all who are concerned in this bill are particularly due to you, and through you to your associates of the Judiciary Committee, for according a hearing to us and listening to the objections that may be advanced to any legislation of this character, and to any amendments to the bill that may be suggested after the bill has gone through the committee and has been reached upon the calendar of the Senate. It seems to me that it indicates an open mind on your part and that of your associates as to whether or not this bill should be passed in its present condition or whether any law of this character should go upon the statute books.

Personally, I am the general solicitor of the the Atchison, Topeka and Santa Fe Railway Company, but I come here not only in behalf of that company, but as the designated representative of a large number of the western railroad lines centering in Chicago and St. Louis, to voice, as best I may, opposition to any legislation of this character, and if it is impossible to prevent such legislation, then to second the very able presentation made by my friend, Colonel Thom, on yesterday, in favor of a substitute or substantial amendment to the bill as it now stands.

SENATOR OVERMAN. Do you support that substitute?

MR. LATHROP. Yes, sir. In the outset I want to challenge your attention and that of your associates on the committee to the fact that you are altering radically a jurisdiction which has obtained in the federal courts of the United States for nearly three-quarters of a century, as pointed out in *ex parte Young* (209 U. S., 123), as early as the case of *Osborn against the Bank*.

SENATOR OVERMAN. You will give us those citations, will you?

MR. LATHROP. Yes. As early as the case of *Osborn against the Bank* (9 Wheat., 738), the jurisdiction of federal courts of equity to restrain a state statute was maintained and established, and it has continued since the decision of that case in 1824 down to the present time without any limitations, and I submit, from the record, without any substantial abuse.

In the case of *ex parte Young*, the court, on pages 166-167, says: "Finally it is objected that the necessary result of upholding this suit in the circuit court will be to draw to the lower federal courts a great flood of litigation of this character, where one federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the State, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the federal courts."

Again on page 168, at the conclusion of the opinion, the court says: "There is nothing in the case before us that ought properly to breed hostility to the customary operation of federal courts of justice in cases of this character."

I submit, upon the record of the Supreme Court of the United States and upon the record of the district judges themselves upon the circuit, that the right of injunction has not been substantially abused. Those judges are naturally men of conservatism, and with the admonition of the Supreme Court in the *Young* case and in other recent cases, district judges, of their own motion, and in obedience to the suggestions of the Supreme Court of the United States, will always be slow to grant injunctions unless the case made upon the bill is strong and persuasive.

The frequent exercise of power of this character of recent years came, as your honor knows, after a flood of drastic legislation, passed in many instances without due investigation, in response to popular clamor. That wave has passed, and legislatures, reflecting public sentiment, are now more considerate, cautious, fair, and conservative in the treatment of questions affecting public-service corporations.

Federal intervention is only invoked and was only invoked during that wave, in extreme cases, where ill-considered legislation had been passed without due investigation and where the rights of large property interests were about to be stricken down without the protection guaranteed by the Federal Constitution and the laws made in pursuance thereof.

That courts of equity ought to have the power to stay the effect of statutes which threaten irreparable injury is very clearly and aptly stated by the Supreme Court of the United States in the case of *Vicksburg Waterworks Company v. Vicksburg* (185 U. S., 65).

In that case the court said, as to the right to an injunction:

“It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant’s rights under the contract, that mere apprehension that illegal action may be taken by the city can not be the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We can not accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties—in disclosing to the defendant that he is proceeding without warrant of law and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights.”

In the very cases where the largest amount of popular indignation was aroused, a case arising in your own State and a case arising in the State of Minnesota, the action of the district judges, sitting as circuit judges in both of those cases, as your honor well knows, was affirmed by the Supreme Court of the United States, and after that court in those cases made it clear to the thinking people of this country that the Constitution and laws of the United States were just as operative and just as controlling in the States as were state statutes, and that wherever state statutes came in conflict with the Constitution and the laws of the United States the latter were the supreme law of the land, public indignation ceased. Right-thinking people saw that in our dual system of government that must be recognized, and, as I have said, the flood of ill-considered legislation stopped, the wave of popular frenzy ceased, and men began to

recognize that it was not only the law but that it was to the interest of the Republic that property rights should be maintained and established, and wherever state statutes came in conflict with the supreme law that it was right and just that they should go down and property interests be protected.

What is going to be the result if you take away this power from the district judges? Suitors in other cases will have the right to injunction orders and decrees from district judges, while such right will be denied to suitors attacking unconstitutional statutes. Wherever there is a private right the jurisdiction of the district or circuit judge, sitting alone, remains unimpaired. But where the wrongs are infinitely greater, where the losses are immeasurably larger, a district judge sitting in the very State in which the controversy arose is powerless to grant relief in one case to one class of citizens and property owners, while he has full authority and jurisdiction to grant it to every other.

I respectfully submit that there is no reason why a suitor should not have relief against the many, whose legislative acts invade his constitutional rights, just as another suitor has relief against the threatened acts of an individual.

I think, as Colonel Thom so clearly pointed out yesterday, that the courts without any sort of limitation on their jurisdiction should stand with the full power to protect the rights of the minority, or of the one against the many, and that the reasons why that jurisdiction should be maintained are far more cogent and persuasive than to leave the jurisdiction between two suitors where private rights are involved, and deny it in cases where the power of the many, through the legislatures of the respective States, have passed laws which are invalid under the Federal Constitution, affecting the rights of large property owners.

If the jurisdiction is taken away from the district judges, the anomalous condition will arise that the inferior judges of the state courts of the Union will have the right to enjoin the enforcement not only of state statutes, as Colonel Thom suggested yesterday, but of federal statutes as well, alleged to be unconstitutional, while district judges of the courts of the United States, which are the courts of the people as much as the state tribunals, will have no right to stay the effect of void state statutes.

I submit that the personnel of the district judges deserves no such legislative affront. They have been and are, as all lawyers know, as a class, leaders of the bar of their respective States, many of whom have been on the supreme bench of the different States. They are, as a class, men of conservatism. They not only constantly exercise the duties of judges *at nisi prius*, but are often called upon to sit on the circuit court of appeals.

The eighth circuit, to which Senator Long and I belong, does not have a term of the circuit court of appeals, so heavy is the docket, but that district judges are called from distant parts of the district to sit on the circuit court of appeals. Often, in hearing causes in that court, there are two district judges sitting and but one circuit judge.

Your honor spoke of an appointment in your own State of a man to the federal bench taken from the supreme court of your State. Judge Pollock, in Senator Long's State, was an honored member of the supreme court of his State and has made an enviable record as district judge. He is frequently called into the State of Missouri to

perform the duties of circuit judge, and in his own State is doing almost the entire nisi prius work of the circuit judge. Considering the record of the district judges, as written in the volumes of the Supreme Court of the United States, in this time when popular clamor has ceased, why offer to those servants of the people an undeserved affront and take from them a power that has been exercised by them and their predecessors for little less than a century?

In times of popular clamor and excitement, owners of large property interests are entitled to protection against ill-considered and hasty legislation—entitled to it at the hands of a district judge of the United States sitting in the State itself and perfectly familiar with conditions. As your honor well knows, it is the great glory of our institutions, unique among the governments of the world, that the courts have a right to strike down legislative acts, whether federal or state, because they are in conflict with the national Constitution. And you know, as every public man and every lawyer knows, and every thoughtful citizen knows, that in times of popular excitement and clamor, when there is danger of the rule of the mob being written down in the statute books, the courts have been the defense of our people and our interests, sitting calm and immovable and administering the law fearlessly.

I say that it would be a reproach, it seems to me, upon the administration of justice and upon our institutions in times like these to cast any aspersion not only on the district judges as persons but upon the administration of justice by the national courts, which, since the foundation of the Republic, has proved our protection against the invasion of property rights in times of great national and state excitement.

The difficulty of assembling three circuit judges, or two circuit judges and a district judge, would lead to serious embarrassment, long delay, and, in many cases, to irreparable injury. In many circuits of this country the judges live at long distances from each other. The circuit judges in many circuits are overwhelmed with their work on the court of appeals. To insist that before any injunctive relief shall be given, three judges, of whom two shall be circuit judges, shall be found, would be, in many cases, a substantial denial of justice.

In this connection I wish to read into the record two letters applicable to this legislation, showing the practical difficulties that will result if it should be passed, or if any bill of a similar character to that now under consideration should become a law.

The first letter is from Mr. Blewett Lee, general solicitor of the Illinois Central Railroad. It is as follows:

ILLINOIS CENTRAL RAILROAD COMPANY,  
LAW DEPARTMENT,  
*Chicago, January 15, 1910.*

GARDINER LATHROP, Esq.,  
*General Solicitor The A. T. & S. F. Ry. System,  
Railway Exchange, Chicago.*

DEAR SIR: In regard to the Overman bill (S. 3724) I observe that it requires a hearing before at least two circuit judges and one district judge or circuit judge. The Yazoo and Mississippi Valley Railroad Company, a corporation incorporated in Mississippi and having most of its lines there, has recently had occasion to file two bills in the

circuit court of the United States against the Mississippi railroad commission in regard to rates on cotton. This railroad company has not been making operating expenses for more than a year. The bills were based upon this fact as well as upon charter exemptions from rate regulation. The statute of Mississippi imposes a \$500 penalty for every shipment at a higher rate than that charged by the commission. Cotton cuts a great figure in the traffic of this railroad company, and the reduction of rates made by the commission would make a formidable increase in the annual deficit of the company.

Assuming that the Overman bill had been the law, the list of the judges of the fifth circuit discloses that the three circuit judges are located at Atlanta, Ga., Dallas, Tex., and Huntsville, Ala. Not only would the complainant have been bound to travel a long distance outside of the State of Mississippi to find Judge Shelby, the nearest circuit judge, but he would have had to obtain another circuit judge from Atlanta, Ga., or Dallas, Tex. There is only one district judge in Mississippi at all, and no other district judge nearer to Mississippi than New Orleans or Mobile. In order to prepare the bill at all, it was necessary to make an elaborate study of the accounts of the railroad company, at a great loss of time and at great labor, and the impediment created by the Overman bill would have been a very serious obstacle to getting into court at all.

Yours, truly,

BLEWETT LEE,  
*General Solicitor.*

The second letter is from Mr. George R. Peck, general counsel of the Chicago, Milwaukee and St. Paul Railway Company, and is as follows:

CHICAGO, MILWAUKEE AND  
ST. PAUL RAILWAY COMPANY,  
OFFICE OF THE GENERAL COUNSEL,  
*Chicago, January 20, 1910.*

MR. GARDINER LATHROP,  
*General Solicitor, A. T. & S. F. Ry.,  
Chicago, Ill.*

DEAR SIR: I learned to-day that you are expecting to be in Washington soon and will request a hearing before the Judiciary Committee on Senate bill 3724, introduced by Senator Overman. The effect of the bill, if it becomes a law, though doubtless such was not the purpose of Senator Overman in introducing it, will be to impose unnecessary and unreasonable obstacles upon parties complaining of action or threatened action under unconstitutional state statutes.

It proposes to take from district judges of the United States a jurisdiction which they have exercised from time immemorial—a jurisdiction which is wholesome and necessary for the protection of the people of the United States in their legal and constitutional rights. It seems to me the language of the bill implies that the judges of the United States can not be trusted to administer justice fairly and impartially in the granting of interlocutory and temporary orders. It requires that all applications for temporary injunctions or for a temporary restraining order shall be presented to a circuit judge, and even prohibits that officer from acting upon the applica-

tion except in conjunction with two other judges, at least one of whom shall be a circuit judge.

There are several judicial districts in the United States where there is no circuit judge, and where no application can be made within the district except to a district judge.

There are only 25 States in the Union which have a circuit judge residing within their boundaries. Each of these 25 States has one circuit judge, and New York has 3, Ohio, Illinois, and California 2 each.

Eighteen States have no circuit judge at all, namely: Arkansas,<sup>7</sup> Colorado, Florida, Idaho, Kentucky, Louisiana, Maryland, Mississippi, Montana, Nevada, New Hampshire, North Dakota, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington.

To give no circuit judge to the people of any of these 18 States, and then deprive the district judges of jurisdiction to grant temporary injunctions and restraining orders will, in effect, be a denial of justice in many instances. The provision requiring the circuit judge to whom application is made to immediately call to his assistance one circuit judge and one district judge or another circuit judge would be a very inconvenient, unwieldly, and almost impracticable method. While in New York, Ohio, and Illinois, and the densely populated portions of the country the distance between the residences of the circuit judges might not be very large, yet in other parts of the Union they live very remote from each other, and to assemble three judges, of whom two must be circuit judges, would consume much time and be burdensome and expensive.

As an illustration of the hardships which would ensue if the bill becomes a law, consider the States of North Dakota and South Dakota, neither of which has a circuit judge nearer to the people of either State than St. Paul or Cheyenne.

There are many other objections which might be urged against the provisions of the bill, and they doubtless will occur to you. One is the unfair reflection upon the character of the district judges. These latter necessarily carry on the great bulk of current business, while the circuit judges sit a large portion of the time in the court of appeals. If the district judges are qualified to hold the terms of the circuit courts, as they often do, it seems unreasonable to declare that they can not be trusted in the issuance of interlocutory and temporary orders.

Yours, very truly,

GEO. R. PECK, *General Counsel.*

While this proposed law is general in its character, it can not, of course, fail to be recognized that the real inspiration of the law has come from the popular feeling that arose at one time in your State, and in Minnesota and other States, against the interference by federal judges with state statutes passed to regulate railroad rates. In attacks upon rate laws, district judges, if any legislation is to be passed, should at least have power to issue restraining orders in the first instance and preserve the status quo and prevent the accumulation of penalties, such order to remain in force until the hearing and determination of the application for a temporary injunction.

As your honor knows, under the system of rate making in the United States, as pointed out by Colonel Thom yesterday, there is hardly a state statute, if any, affecting railroad rates in a given State, which does not necessarily and directly affect interstate rates, and

thus impose a burden on interstate commerce, and it seems to me that that reason alone, so far as legislation of this character diminishes the right of interference by federal judges with state rate laws, ought to be a powerful and persuasive and overwhelming argument against any such legislation, so as to reserve to the federal authority, as our fathers reserved it in no unmistakable language, the supreme control over interstate and foreign commerce.

Frequently, as your honor knows, under many constitutions—it is so in the State from which I came a few years ago to Chicago, the State of Missouri, where I lived most of my life—there is a provision that laws may be passed, known as emergency laws. That is, if the legislators desire some law to go into immediate effect they can state in the bill that it is of so great importance, and the demand for its passage is so urgent, that an emergency is created under the constitution, and that therefore the law shall go into effect from the date of its passage and approval.

Now, take cases of that character, which are liable to occur in periods of great excitement, and before an application could be made to three circuit judges, or to two circuit judges and a district judge, property rights inestimable in value may have been stricken down without any power on earth for recovery or redress.

Senator OVERMAN. Would that be so with your amended bill?

Mr. LATHROP. No, sir. In that amended bill it is provided, as you will perhaps recall from Colonel Thom's reading of it yesterday, that while the main features of the Senate bill are preserved there is a right to apply to a justice of the supreme court or a circuit judge or a district judge in the first instance, and, upon making a proper showing, obtain a restraining order, to remain in force until the hearing and determination by the three judges of the application for a temporary injunction.

In that way the status quo is preserved. Nobody is injured. The application is made to one judge, and the situation is preserved until such time as there may be a full, considerate hearing, no penalties being incurred and no agents subjected to criminal prosecution in the meantime. They will be protected by the order of a judge of one of the courts of the United States.

Where state statutes are passed affecting railroad rates, not only state tariffs have to be changed but interstate tariffs as well, because rates are so inextricably interwoven that no state rate can now be prescribed without its affecting interstate rates, rates being based in many instances upon the local rates in the States.

Employees must also be instructed as to their duties under a statute which, upon hearing, may be held void.

The loss in the meantime will be absolutely irrecoverable.

If there is no power to arrest it, the road may have to put the law into operation. The state government can not reimburse, and the loss, in the language of the law, is irreparable.

On the other hand, in the cases of rate laws, as you know, if the restraining order should be found upon full hearing to have been improperly granted, the shipper is entitled to reparation for the difference between the rate prescribed by the State and the rate demanded by the railway company.

Whether in all instances it amounts to adequate reparation or not is beside the case. Because under the safeguards now provided,

it does amount to substantial reparation by having a bond filed or a deposit made of the difference between one rate and the other. But whether adequate or not, in one case the law provides substantial protection to the shipper; in the other case the owners of the property furnishing the public utility, unless they can arrest the statute pending a judicial investigation, lose their property in the meantime, without any right of reparation against either State or individual.

As your honor knows, a single judge has a right under existing law to grant a restraining order when otherwise irreparable injury would result. The so-called "administration bill" amending the interstate commerce act to create a court of commerce contains a provision for a restraining order, in the discretion of the court. That bill in the Senate is S. 5106, and was introduced by Senator Elkins on the 11th of January, 1910.

Section 3 of that bill reads as follows:

"SEC. 3. That suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the court of commerce against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court of commerce, in its discretion, may restrain or suspend the operation of the commission's order pending the final hearing and determination of the suit. No order or injunction so restraining or suspending an order of the Interstate Commerce Commission shall be made by the court of commerce otherwise than upon notice and after hearing, except that in cases where irreparable damage would otherwise ensue to the petitioner a judge of said court may allow a temporary stay or suspension of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of his order, pending application to the court for its order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judge making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension until its decision upon the application."

Now, I respectfully submit that with respect to the orders of the Interstate Commerce Commission—your honor knows that such orders are only made after painstaking investigation, continued over a long period of time, hearing witnesses on both sides and argument of counsel and handing down written opinions—if relief is to be accorded in cases of that kind by a single judge where irreparable injury is threatened, how much more reason that there should be lodged in a single judge of the federal court a right to arrest the operation of state statutes, passed often, as your honor knows, without the time or means of making investigation, even without hearing both sides and generally without hearing arguments of those affected by such legislation, so as to afford protection against their going into effect where irreparable damage would result.

Senator OVERMAN. Will you cite me to the provision of the expedition statute?

Mr. LATHROP. Yes, sir. I have the statute right here. It was approved February 11, 1903. It is as follows:

AN ACT To expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in any suit in equity pending or hereafter brought in any circuit court of the United States under the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

SEC. 2. That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a circuit court to the circuit court of appeals before this act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law.

Public No. 82, approved February 11, 1903.

Now, as your honor knows, the Hepburn law provided that in the case of attacks upon the commission this law should be appealed to.

Senator OVERMAN. I was anxious to have that in the record.

Mr. LATHROP. There is another class of laws—there may be many others—but there is one class of laws covered by this bill of great importance to corporations such as I represent and appear for here, namely, tax statutes passed by the different States. In the case of actions attacking statutes, such as tax statutes, if the district judges were without authority to issue restraining orders, engines and cars might be seized and the carriage of the mails and interstate commerce be seriously interfered with. A case in point: The State of Oklahoma, through which the Santa Fe and other roads run, passed an act which, in addition to other laws taxing all the property of the railroads in the State, their station houses, roadbed, equipment, etc., provided for a gross-revenue tax, and did not limit it to the

gross revenue obtained from business done within the State of Oklahoma locally, but included the revenue derived from its interstate business as well. The law provided that if the tax was not paid the state auditor could issue his warrant to the sheriff of any county through which the railroad runs, commanding the sheriff to seize the property of the railroad company in order to collect the tax.

Now suppose your bill became a law. The nearest circuit judge to Oklahoma would be in Leavenworth, Kans., if he were at home. During the greater part of the year he is either in St. Paul, Minn., or in St. Louis, Mo. Another circuit judge lives in St. Paul, something less than a thousand miles away. Another lives in St. Louis, perhaps 500 miles away; another lives in Cheyenne, Wyo. You have got to wait until your rights are threatened, or else you will be met with the objection in court that you have come into court too soon, before you are injured or before there has been threatened injury, and unless you can appeal to a district judge in the State where the controversy arises to arrest the issue of the auditor's warrant and the seizure by the sheriff of the engines and cars of the railroad company, interstate commerce might be interfered with; the carriage of the mails might be stopped, because frequently in busy times the railroads are taxed to furnish motive power and cars to do the business of the public.

Certainly in such cases, where such drastic rights are sought to be exercised by the State or the public, and they are drastic undoubtedly, because the power to tax, as your honor knows, and as the Supreme Court said so many years ago through Chief Justice Marshall, involves the power to destroy, there ought to be some arm somewhere in that jurisdiction to say, "Until there can be a fair, dispassionate, and impartial hearing on both sides, you shall not stop the commerce of the country; you shall not stop the United States mails."

This property owner has a right to preserve the status until it can be ascertained whether there has in fact been an attempt to tax not only revenue from local business but from interstate commerce, because the Supreme Court of the United States has said that interstate commerce can not be taxed by the States.

In Oklahoma the road I represent and other roads had exactly that situation within the past three months, where the state auditor was about to issue his warrant to the sheriff under which the sheriff would have legal protection to seize the engines and cars of the railroad companies, if we did not have the right and did not exercise that right, to go before the district judge and say "protect us from this seizure"—which he did—because of a decision of the United States Supreme Court in a recent case.

If we had not the right, if we had to go, as under this bill, to St. Paul, Cheyenne, Leavenworth, or St. Louis, engines might have been seized, cars stopped, and business for the time being impeded and the carriage of the mails interfered with.

Certainly you will hesitate long, I submit, before you will give your official approval to an act that will not give adequate protection in cases of that character.

Senator OVERMAN. Where are the headquarters of your road?

Mr. LATHROP. At Topeka, Kans. The company is chartered under the laws of the State of Kansas, having simply its local superintendents and agents in the State of Oklahoma. In Oklahoma it is a foreign

corporation, not a local corporation at all, whose business extends over ten States and Territories, its tonnage going all over the country and, through the port of Galveston, Tex., on its own line, to all parts of the civilized world. And yet that law was so drafted that not only the revenue from local business, which was the only revenue which they had a right to tax, but all revenue received by the railroad in Oklahoma was taxed, whether it came from local or interstate business, without any distinction.

Senator OVERMAN. How long would it have taken you to get an injunction against that, under this particular bill?

Mr. LATHROP. I do not know, Senator. If the court had been in session in St. Paul—the court of appeals holds a session there beginning in May and running into the summer, having cases every day—it might be that between the adjournments of court we might have enlisted the attention of the judges. Or they might have been in St. Louis. Or the judges might have been separated. In the summer time one judge may go abroad, another may go to New England on his farm, another may be on the Pacific coast. The necessity for an application may happen at any season of the year. If you have to gather up two or three circuit judges or two circuit judges and a district judge, you can not tell, it might amount to a denial of justice.

Sometimes you might get immediate action. But suppose they are not off on their vacation, but are writing opinions somewhere, one in St. Paul, one in Cheyenne, one somewhere else. You can not get relief from one. You have got to get three—and a majority of those must agree to the order. The question has been raised as to whether under the bill the judges must be together when the application for a restraining order is presented, or whether they can act on it separately.

Senator OVERMAN. What is your construction of it? Do you think that?

Mr. LATHROP. Well, I do not know. I confess I should have thought, if the question had not been raised, that, for instance, if you and Senator Long and I were circuit judges, counsel could take an application to you and get your approval, and then go to Mr. Long and get his approval, and then bring it to me and get my approval.

Before the question came up I thought probably that was what you could do. But, one of the lawyers in writing on this subject, a very astute lawyer by the way, the general counsel of this company, now in New York, Mr. Walker D. Hines, when it was suggested to him that successive applications could be made without assembling the judges, stated that he did not agree that that was the proper construction of the bill. The bill says:

Whenever such application, as aforesaid, is presented to a circuit judge he shall immediately call to his assistance—

Now, ordinarily, that would mean that you must summon them to where you are if you want assistance. For instance, if you were holding court in your State, and you wanted assistance, you would summon a judge to the place where you were holding court. Otherwise it would hardly seem to me to be proper phraseology to say “he shall immediately call to his assistance.” You want the advice, you want the aid, the help, the assistance of those two other judges, one circuit judge and one district judge or another circuit judge, to

discuss the matter with them, the question being, "Shall we grant a restraining order or deny it?" That is what "aid" means, and that is what "assistance" means. You get the benefit of the views of the other two men. They present their views and you present yours, and out of the joint presentation you get a result either of the majority or of all three. So that it would certainly seem to me that it would be legitimate matter of debate, at any rate—that calling judges to your "assistance" would mean that they would have to come to you, and that action by the judges could not be taken separately. In that event they are not assisting you. You are acting independently and you are invoking the separate views of the other two judges as to whether there should be a restraining order granted prior to the application for the temporary injunction.

The bill says:

"Said application shall not be heard and determined until five days' notice of the hearing has been given to the governor and attorney-general of the State and such other persons as may be defendants in the suit: *Provided*, That if a majority of said judges"—

That would seem to convey the idea that the three judges are sitting together and that they have heard this application for a temporary injunction. They have been called to the "assistance" of the first circuit judge. A showing has been made by the suitor, who says: "We can not wait for five days until the governor or attorney-general comes in. Nobody is bound to account to us if we lose our property in the meantime."

The bill says:

"That if a majority of said judges are of the opinion, at the time notice of said hearing is given as aforesaid, that irreparable loss and damage would result to the applicant unless a temporary restraining order, pending the period of the required notice, is granted, a majority of said judges may grant such order, but the same shall only remain in force until the hearing and determination of the application, upon due notice as aforesaid, has taken place."

Mr. LONG. "May grant such order."

Mr. LATHROP. Yes. That is a very pertinent suggestion. They "may grant such order." The majority of said judges called to the assistance of the first judge "may grant such order." What order? After hearing what the suitor had to say, the majority of said judges, presumably acting together, may grant an order giving temporary relief.

Now, I admit that an argument may be made on the other side as to the judges sitting separately. But that is a matter of legitimate debate, and if the bill is to be passed all doubt should be set at rest by a specific expression. If you are going to make the suitor go to St. Paul or St. Louis or Leavenworth—if he is obliged to go to St. Louis to get the approval of Judge Adams, and go to Cheyenne to get the approval of Judge Van Devanter, and go to St. Paul to get the approval of Judge Sanborn in the eighth circuit, and that may be what was in mind—I submit that whatever construction is placed upon the bill, it is putting an impediment in the way of the preservation of property rights that ought not to be imposed under our system of jurisprudence.

In the case of rate statutes, as I said, the shipper has his right of reparation if we charge too much. Under the tax statutes, if their

going into effect is arrested and the seizure of property is interfered with by the federal courts and it is decided that the statute is valid, we not only have to pay the tax, but we also have to pay the penalty under the law.

I am shortly to conclude, but before closing I want to say that whatever may have been your honor's view at the time this legislation was originally conceived—no matter what may have been the public temper then—when in your judgment it was for the interest of the public, in order to allay popular excitement, that at least two out of three judges should agree on a temporary injunction, arresting the going into effect of a state statute, I submit that no such public emergency exists now.

Senator OVERMAN. I am glad to say that it does not exist now, but might it not occur again?

Mr. LATHROP. I think not, because after the case of *ex parte Young* was decided, and the North Carolina case was decided—after it was sharply brought to the attention of the American people in those recent cases that the Constitution and laws of the United States were just as much the laws of the State as were state statutes; and that where they came in conflict the Constitution of the United States was the supreme law of the land, the right-thinking people acknowledged it, public clamor subsided, the insistence upon drastic legislation, confiscatory legislation, passed away.

And now it seems to me that the passage of such a bill as this would be a legislative recognition by the National Congress of the right of the people to pass ill-considered legislation in response to public clamor, legislation whose enforcement can no longer be arrested by a single federal judge, exercising a jurisdiction which, as I have said, has existed without legislative impediment for more than three-quarters of a century.

And whether that public clamor is liable to arise or not I submit that with the acknowledgment of the National Congress and every intelligent citizen that the Constitution and laws of the United States are the supreme law of the land and are operative in every State without regard to state lines, this committee of lawyers of the Senate and the like body in the House of Representatives should not give their sanction to an affront upon the federal judges and to a recognition upon the statute books of the justice of the attack which has been made upon them.

In any event if public sentiment or your idea of public duty makes it necessary, in your judgment, that some such legislation should be passed, it seems to me that we are certainly entitled in the first instance to have the bill so amended that the granting of temporary restraining orders by district judges, in cases of emergency, without notice, should be authorized where irreparable injury would otherwise result, such order to remain in effect until the hearing and determination of the application for a temporary injunction. By that course nobody is injured. The shipper in rate cases is protected by his right of reparation; the State is protected in its tax cases, because if the state tax is held valid penalties accrue and can be enforced against the property. On the other hand, if unconstitutional statutes can not be restrained from enforcement irreparable injury will result in many cases and loss incurred which can not be recovered from the State or the individual.

Provision should also be made for the assembling of the judges within a definite time. That is to say, if the application for a temporary injunction must be submitted to three judges, the law should provide that they should be assembled within a reasonably short time, so that the rights of the parties may be promptly considered and the necessary orders obtained after hearing.

Another amendment, it seems to me, if there is to be any legislation of this sort, should be that the district judge who should sit with the two circuit judges (and I think one district judge should sit with them) should be a district judge of the State which passed the law whose validity is being challenged. The district judges are there in each community. They are men to whom the Senate of the United States has given a certificate of character by confirming them. As I have said and repeated, they are men of the highest character and standing at the bar, many of them coming from the supreme bench of their respective States. They are familiar with local conditions and familiar with the history of legislation in their particular States, and they, of all people, are those who should be called to the assistance of the circuit judges in order that the circuit judges may be enlightened as to local conditions and local legislation.

Senator OVERMAN. Is there any such provision as that in the proposed bill submitted by Colonel Thom?

Mr. LATHROP. No, sir; there is not. It contains a provision requiring that any judge can issue a restraining order in the first instance, whether district judge, circuit judge, or associate justice of the Supreme Court. We did not wish to encumber the bill. And that is rather my individual view perhaps than that of the other gentlemen concerned in the bill. But I think it is well worthy of consideration—that there should be a district judge sitting with the circuit judges, and that that district judge should be a district judge of the State where the controversy arose.

As I have said, the bill proposed by Mr. Thom meets my views, aside from that suggestion of an amendment that the district judge should be from the State where the controversy arose, because the bill provides that any judge, district judge, circuit judge, or associate justice of the Supreme Court (any one to whom the bill is presented, properly verified and supported by the necessary affidavit), if convinced that irreparable injury will be done, should have a right to preserve the status quo—simply to prevent irrecoverable loss being sustained, irreparable injury being inflicted, where the rights of the shipper in the one case (as in a rate case) and where a right of the State (as in a tax case) are adequately protected. The shipper would be protected from excessive rates by his right of reparation, and the State would have the right to recover a penalty for a tax which the courts of last resort say was lawfully imposed.

But it does seem to me that, taking our National Government as it is constituted, recognizing that our greatest protection in times of clamor has been, is, and will be the judiciary of our country, the Congress of the United States can not afford to dignify popular clamor by enacting into law a reflection upon the judges of the courts of the United States and throwing in the way of the administration of justice impediments that ought not to be imposed.

Senator OVERMAN. I am much obliged to you, Mr. Lathrop, for the presentation of this important question which you have made

here and which will be on record and in print for the use of the Committee on the Judiciary.

(The subcommittee then adjourned until Saturday, January 29, 1910, at 3 p. m., at which time another adjournment was taken until Monday, January 31, at 3 p. m.)

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COMMITTEE ON THE JUDICIARY,  
UNITED STATES SENATE,  
*Monday, January 31, 1910.*

The subcommittee met at 3 p. m. Present, Senator Overman.

**ARGUMENT OF HON. CHESTER I. LONG, OF MEDICINE  
LODGE, KANS.**

Mr. LONG. I represent a committee selected by the bankers of Kansas to test the constitutionality of the bank guaranty law of that State. I am one of the counsel retained by that committee to conduct that litigation. Several suits have been brought in the federal court in Kansas, and temporary injunctions have been obtained against certain state officers. It may be necessary to bring other suits in the future, and the experience we have had in that litigation has impressed me and the committee with the belief that this bill is unwise legislation.

It is well to observe that the bill is demanded because of what followed certain legislation enacted by a number of States some four or five years ago. For several years efforts had been made to amend the interstate-commerce act, giving more power to the commission. That legislation was enacted after a great deal of discussion throughout the country and in Congress, on June 29, 1906, and was known as the Hepburn law. It related only, of course, to the regulation of interstate commerce. Following that legislation and the discussion and agitation of the question the legislatures of many States (in the West and South) passed laws to regulate intrastate commerce. Such laws were passed in Minnesota, North Carolina, and other Western and Southern States. The experience of the States prior to that time in enacting railroad-rate legislation had not been satisfactory. A number of such laws had been declared unconstitutional by the Supreme Court of the United States. And so it was that in the enactment of the laws in 1907 there was an attempt made by certain provisions in them to deter or prevent a resort to the federal courts to have them declared unconstitutional.

They contained severe penalties and provided for imprisonment of the officers and employees who failed to comply with their provisions.

Whatever may have been the purpose of those responsible for the enactment of these laws, it is sufficient to say that they all met a common fate and were declared invalid by the Supreme Court of the United States in the case of *Ex parte Young* (209 U. S., 123).

It was determined in that case that these laws, by reason of the provisions for extreme penalties and severe punishments, were unconstitutional and void and were intended to prevent a judicial review of the sufficiency of the rates. Other efforts have been made to prevent recourse to the federal courts to test the constitutionality

of state laws. Proceedings have been brought in state courts so as to give the state courts jurisdiction first upon the theory that when a federal court found that a state court had assumed jurisdiction then the federal court would not take jurisdiction of the case.

I have had some recent experience myself in the litigation to which I have referred that has impressed me very forcibly with the fact that there is a disposition abroad to prevent recourse to the federal courts. I am at this time a defendant in an undisposed-of case in the supreme court of Kansas that was brought by the attorney-general of that State to test the bank guaranty law of Kansas, and prevent if possible, a resort in the first instance to the federal court to determine its validity.

But all these various plans and devices to give the state courts exclusive jurisdiction of cases enjoining state officers have failed and the federal courts are still open to litigants who come within the jurisdiction vested in those courts.

After failing in these efforts resort is now had to this proposed legislation, hoping that through Congress a result may be obtained that they have not been able to obtain in any other way.

Senator OVERMAN. There is no such intention with regard to this bill.

Mr. LONG. I am not speaking of the purpose of the author of the bill.

Senator OVERMAN. I have had no conference with anybody whatever about it.

Mr. LONG. I am speaking of those who will support this measure and to whom it will most strongly appeal. Your purpose in the bill, as I understood from the statement you made a few days ago, was to relieve a single federal judge from the embarrassment that might result from declaring a law of a State unconstitutional and invalid, your purpose being to divide the responsibility so that it would not rest on a single federal judge but would be divided among three.

Senator OVERMAN. If you argue that it was a device on the part of the States to keep cases out of the federal court, let me ask you how the State of North Carolina could have got into the federal court with that case? It was a State case.

Mr. LONG. In cases of this character diverse citizenship is not necessary. In a case raising the constitutionality of a state statute on the ground that it contravenes the Constitution of the United States, the person bringing the suit need not be a citizen of another State.

Senator OVERMAN. Why could not such cases be heard in a state court? Your idea, as I understand, was that it was a device of the State to keep the foreign corporation from going into the federal court. How could that have been possible?

Mr. LONG. It does not apply to foreign corporations only. Any person who alleges that the statute contravenes the Constitution of the United States has a right to sue in a federal court, though he be a citizen of the State in which the suit is brought.

Senator OVERMAN. The question could as well be settled in a state court.

Mr. LONG. A person should have a right to go into the federal court.

Senator OVERMAN. I think the state judges are as honest as the federal judges.

Mr. LONG. That may be; but it is in the interest of justice to have these questions finally decided by the Supreme Court of the United States as soon as possible.

Senator OVERMAN. They can go to the Supreme Court and get that result as well by a writ of error.

Mr. LONG. They can not.

Senator OVERMAN. Why not?

Mr. LONG. There is an appeal from the state court to the supreme court of the State. Then a writ of error lies from the supreme court of the State to the Supreme Court of the United States. When a suit is brought in the United States circuit court raising the constitutionality of a state statute on the ground that it contravenes the Constitution of the United States, a direct appeal from the final decree may be taken to the Supreme Court of the United States. In the first instance you have three courts with the delays incident to three hearings. In the second there are two courts. There is a great saving of time and there are other differences.

Those who are interested in upholding the statute of the State believe they have certain advantages in the state courts.

Senator OVERMAN. I do not think you should try to make any reflections on the author of this bill when he has had in view the direct opposite of what you state.

Mr. LONG. I do not.

Senator OVERMAN. You implied that one of its objects was to deprive the people of the protection of the Supreme Court of the United States.

Mr. LONG. The result of this bill will be to partially close the federal courts and interfere with and impede litigation in those courts.

Senator OVERMAN. It is very well to talk about the results, but so far as concerns the purpose of the bill there was no such purpose as you have in mind.

Mr. LONG. I understand that your purpose in the bill was to divide the responsibility of the federal judges, so that a single federal judge might not have imposed upon him the responsibility of declaring a statute of his State unconstitutional.

Senator OVERMAN. The trouble that we had in North Carolina amounted almost to a revolution, and my idea was that if three judges would act on a great constitutional question the feelings of the people would not be so aroused. It was for the purpose of allaying prejudice and not to arouse more prejudice that the bill was presented—primarily to allay the prejudice which arose in my State.

Mr. LONG. That being the purpose, I want to call your attention to the results that will follow this legislation. The federal judges themselves might welcome this legislation, because it certainly is not a pleasant duty to be compelled to decide that an act is unconstitutional after it has been passed by the legislature and approved by the governor. But, be that as it may, the courts, as stated in the Young case, are charged with that responsibility, and they can not evade it.

I wish to call your attention to the statement in the Young case, taken from an earlier decision of the United States Supreme Court by Chief Justice Marshall:

“It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary can not, as the legislature may, avoid a measure because

it approaches the confines of the Constitution. We can not pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we can not avoid them. All we can do is to exercise our best judgment and conscientiously perform our duty."

That is the position, I assume, of federal judges generally in regard to the question of limiting their jurisdiction. I do not ask that this jurisdiction be retained in the interest of the judges themselves, but in the interest of litigants in these courts who have rights that should not be invaded.

If this bill becomes a law, I wish to call your attention to its effects in the eighth circuit, where I live. That circuit comprises 12 States and 1 Territory. It extends from the Canadian line on the north to Texas and Louisiana on the south; from the Mississippi River on the east to beyond the summit of the Rocky Mountains on the west. In that circuit there are four circuit judges. Those judges are now almost entirely occupied with their duties in holding the circuit court of appeals. One of those judges—Judge Hook—lives at Leavenworth, Kans. He is hardly ever there. He has held the circuit court in our State only once or twice since his appointment as circuit judge seven years ago. Another judge lives at Cheyenne, Wyo., another at St. Paul, Minn., and the fourth at St. Louis, Mo.

Those judges spend their time almost entirely either at St. Louis, Mo., or at St. Paul, Minn., engaged in appellate work. If this bill becomes a law, it will be necessary for litigants in Kansas to go either to St. Louis or to St. Paul to present an application of this kind. It would be necessary for persons living in Utah to go across the States of Colorado, Kansas, and Missouri to St. Louis, or still farther, to St. Paul, in order to present such an application. After the application is presented it would be necessary to assemble three judges and have the hearing either at one of the places named, or the judges would be compelled to leave their appellate work and go to the State. The district judge who lives in the State in which the controversy arose would not necessarily be one of the judges who heard the application. He would be only one of the three when called in by the circuit judge to whom the application was made.

Something was said the other day about the hardship on the representatives of railroad corporations who were compelled to make such applications. If it is a hardship on them, it is a greater hardship on persons and on other corporations who have not the facilities which they have for travel without expense. It is a hardship on any person desiring to go into a federal court with questions of this kind to have the bill passed.

From time immemorial—for three-quarters of a century—the district judge has sat in the circuit court, and since the organization of the court of appeals the circuit courts in our circuit are held almost exclusively by the district judges. If this bill becomes a law, a single district judge sitting in his own court would still have a right to deprive a citizen of his life or liberty. Sitting as a district judge, he would have the right to settle great estates in bankruptcy. Sitting

in the circuit court, he would have the right to declare unconstitutional a law of Congress. He would possess the power to appoint receivers, to grant injunctions in other cases, and the only power taken from him would be that of restraining a state officer from enforcing a state statute. In that respect alone the district judge would be held not sufficiently qualified or able to pass on the questions involved in such a case.

Is there anything in the enactment of a state law that makes it so sacred? Is it enacted with more care and deliberation, that it should have different treatment from a law of Congress?

It is somewhat difficult to say just what course should be pursued in regard to this present bill. It has been reported to the Senate. It is now upon the Senate Calendar. It is not before the committee, but an arrangement has been made for this hearing with the understanding that the full committee shall reconsider the bill and report to the Senate either that the bill be passed in its present form or that certain amendments shall be made to it.

I think the bill is wrong in principle. I think the bill should not be passed at all. But if there is to be legislation on this subject I think the substitute referred to is preferable to this bill. I think the best plan to pursue is to enact no legislation at all. Leave the federal courts with their present jurisdiction in relation to these matters. If that is not possible, then the substitute is not as bad a proposition as the pending bill.

The most extreme proposition would be for Congress to abolish the federal courts or reduce the number of districts. That of course, is not thought of. The result will be in a measure to deter litigants from going into the federal courts. I think there can be no question but that such a result will follow. If that be true, it is a departure by Congress from the policy which has been pursued by Congress since the foundation of the Government.

What has been the policy of Congress in relation to the federal courts? It has been to bring them nearer to the people. It has been to make them more accessible to those who had a right to use them. It has not been to restrict them or to make them hard of access. Twenty years ago the people hesitated about going into the federal courts for the reason that the docket of the Supreme Court was overcrowded so that it was almost impossible to get a final determination of a case. What did Congress do? It created the United States circuit court of appeals, where appeals might be taken in most cases from the district and circuit courts, leaving only to the Supreme Court of the United States appeals where constitutional questions were involved and a few other classes of cases.

Senator OVERMAN. More than a hundred years ago they provided that no injunction should be granted to prevent the execution of a state law.

Mr. LONG. What was the effect of the legislation creating the circuit court of appeals in each circuit? The result was to enable the Supreme Court of the United States to clear its docket, and thus get a quicker consideration of suits brought to that court. And the result of that was to increase litigation in the federal courts.

The same policy of Congress is shown in the increase of the number of districts. States have been divided into two and sometimes three districts for the purpose of bringing the federal courts nearer to the litigants.

Additional judges have been appointed without dividing the districts in order that cases might be tried more quickly with two judges than with one. Divisions have been made in the different districts. In my State the federal courts were formerly held at only two places. Now federal courts in that State may be held at six places. The policy on the part of Congress for a hundred and twenty years has been to bring the federal courts nearer to the people, to make them accessible, to arrange it so that persons who had litigation properly brought in these courts could resort to them with as little expense as possible.

The proposition contained in this bill is restrictive. It will deter people from going into these courts, because of their inaccessibility, because of the difficulty which will be experienced in operation of the machinery provided in the bill.

It is more difficult to get two judges to hear a suit than one; still more difficult to obtain three judges than two. So it is that by the provisions of this bill the result will be to deter litigants from going into the federal courts. It will be difficult to get a hearing. Congress in the bill is called upon to discriminate against its own courts.

These are some of the objections I have to the bill in its present form. The objections also apply to the substitute that has been suggested, but not to the degree that it does to the bill in its present form.

The wise course to pursue in this matter is to uphold the federal courts and retain their present jurisdiction. Let the present powers of district and circuit judges be left unimpaired in dealing with the statutes of the States.

(The subcommittee then adjourned until Thursday, February 3, at 3 p. m.)

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COMMITTEE ON THE JUDICIARY,  
UNITED STATES SENATE,  
*Thursday, February 3, 1910.*

The committee met at 3 p. m.

Present: Senator Overman.

**ARGUMENT OF JAMES A. EMERY, ESQ.**

MR. EMERY. I ask that a copy of Senate bill 3724, to which my remarks are addressed, be spread upon this record.

(The bill is as follows:)

[S. 3724, Sixty-first Congress, second session.]

“A BILL Regulating injunctions and the practice of the district and circuit courts of the United States.

*“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no temporary or interlocutory injunction or temporary restraining order or decree suspending or restraining the enforcement, operation, or execution of any statute of any State by restraining the action of any officer of such State in the enforcement or execution of such statute shall be issued or granted by any circuit or district court of the United States*

or by any judge or justice thereof upon the ground of unconstitutionality of the statute, unless the application for the same shall be presented to a circuit judge and shall be heard and determined, upon issue made and proof taken by affidavit or otherwise, by three judges, of whom two shall be circuit judges and the third may be either a circuit or a district judge, and unless a majority of said three judges shall concur in granting such application. Whenever such application, as aforesaid, is presented to a circuit judge he shall immediately call to his assistance, to hear and determine the application, one circuit judge and one district judge or another circuit judge. Said application shall not be heard and determined until five days' notice of the hearing has been given to the governor and attorney-general of the State and such other persons as may be defendants in the suit: *Provided*, That if a majority of said judges are of the opinion at the time notice of said hearing is given as aforesaid, that irreparable loss and damage would result to the applicant unless a temporary restraining order, pending the period of the required notice, is granted, a majority of said judges may grant such order, but the same shall only remain in force until the hearing and determination of the application, upon due notice as aforesaid, has taken place. That an appeal may be taken directly to the Supreme Court of the United States from any order or decree granting or denying, after notice and hearing, a temporary or interlocutory injunction or restraining order in such case; and the hearing of such appeal shall take precedence over all other cases except those of a similar character and criminal cases."

Mr. EMERY. In opposition to this bill I represent protestants of a character entirely different from those who have heretofore appeared. I present the protest and objection of a great number of American business men and manufacturers, members of the National Association of Manufacturers, and some 225 commercial, mercantile, and industrial organizations, doing business in many States of the Union, typical representatives of the great middle class of American merchants and manufacturers who employ the vast body of salesmen, mechanics, and laborers who support the structure of American industry. The National Association of Manufacturers alone in its constituent units represents an investment of approximately ten billions of dollars, and its members employ in the neighborhood of two millions of men.

Senator OVERMAN. Do these organizations include what are known as the trusts?

Mr. EMERY. No; you will perceive by an examination of the list of organizations and associations represented, which I will file with the clerk of the committee, that I speak for independent manufacturers, the local trade and commercial organizations representing merchants, manufacturers, and commercial agents of innumerable cities.

The interest of this great constituency in this bill proceeds from a very deep-seated concern for the preservation of the full power of the equity arm of the judiciary, and we are no less apprehensive of the immediate and direct effect of this measure than its indirect and remote consequence—that serious danger which flows from the establishment of far-reaching precedents. In our complex commercial and industrial system prevention is more important than cure; pre-

ventive justice almost more essential than corrective or compensatory law. The citizen engaged in industry and commerce must therefore view with alarm a proposal which not only makes it difficult, and under some conditions practically impossible, to obtain speedy and adequate protection against trespass of state officers acting under authority of invalid legislation, but establishes a precedent for interposing obstructions to the speedy application of equitable remedies in other fields of action.

This feeling is by no means confined to laymen. The most eminent minds on the bench and at the bar have frequently emphasized the necessity of preserving the equity power in its fullness and protecting its exercise against the hasty and crippling restrictions of ill-advised though well-intentioned legislation.

Addressing himself to this very subject, Mr. Justice Brewer, of the Supreme Court of the United States, during an address delivered in Brooklyn, N. Y., November 23, 1909, used this emphatic language:

“Government by injunction has been an object of easy denunciation. So far from restricting this power, there never was a time when its restricted and vigorous exercise was worth more to the nation and for the best interests of all. As population becomes more dense, as business interests multiply and crowd each other, the restraining power of a court of equity is of far greater importance than the punishing power of a court of criminal law.

“The best scientific thought of the day is along the lines of prevention rather than those of cure. We aim to stay the spread of epidemics rather than permit them to run their course, and attend solely to the work of curing the sick. And shall it be said of the law, which claims to be the perfection of reason and to express the highest thought of the day, that it no longer aims to prevent the wrong, but limits its action to the matter of punishment?

“To take away the equitable power of restraining wrong is a step backward toward barbarism rather than forward toward a higher civilization. \* \* \* Courts make mistakes in granting injunctions. So they do in other orders and decrees; but shall the judicial power be taken away because of their occasional mistakes? The argument would lead to the total abolition of the judicial function.”

In 1895, noting with prophetic foresight certain critical tendencies of the hour, the President, then Judge Taft, thus addressed the American Bar Association:

“It will not be surprising if the storm of abuse heaped upon the federal courts, and the political strength of popular groups whose plans of social reform have met obstructions in those tribunals, shall lead to serious effort, through legislation, to cut down their jurisdiction and cripple their efficiency. If this comes, then the responsibility for its effects, whether good or bad, must be not only with those who urged the change, but also with those who did not strive to resist its coming.”

That serious warning is no less applicable to legislation of this character than to demands made at that time and continued in this day by forces seeking to destroy the efficiency of judicial protection, that they might free their illegal acts from the restraints of the courts.

As I understand it, this bill substantially provides that no officer of a State shall be temporarily restrained from carrying into effect a

legislative enactment unless the application for the injunction shall be presented to a circuit judge and be heard and determined upon issue made and proof taken by three judges, of whom two shall be circuit judges and the third may be either a circuit or a district judge. A majority of said three judges must concur to grant such application.

Before any judicial action may be had on the application, the circuit judge to whom it is addressed must convene to act with him in hearing and determining it, either two other circuit judges or a circuit and a district judge, after five days' notice having been given to the governor and attorney-general of the State and such other persons as may be defendants in the suit.

But should a majority of the judges at the time notice of the application is given believe that irreparable loss and damage will result to the applicant, unless a temporary restraining order issues pending the hearing of the application, a majority of the judges may grant such order, which, however, shall remain in force only until the hearing and determination of the application.

In response to the criticism of those who have preceded me in this discussion, certain changes in the language of the bill have been made, but they do not substantially alter it or modify its purpose. This measure is not by its language confined to that narrow class of questions which have arisen in controversies between citizens and state officers, in which it has been a delicate question as to whether or not suit was actually being brought against the State in violation of the eleventh amendment to the Constitution. The procedure of this bill must be followed, even though a state officer is about to inflict irreparable damage by enforcement of any enactment of the State, however obviously invalid upon its face, and however serious may be the consequences of the officer's irresponsible and unauthorized action. Under such circumstances I need not demonstrate to you, sir, the right of a citizen to his constitutional guaranty of protection. In our dual form of government we have not only provided for the protection of the citizen against the encroachment of his fellows, but we have likewise given a safeguard against that which is trespass by a political agent of the State when he acts in excess of or in contradiction with his delegated authority. As the Supreme Court put it, with clearness and force, as the State "can act and speak only by law, whatever it does say and do must be lawful." And, therefore, when officers act without valid authority, it is "the mere wrong and trespass of individuals who falsely speak and act in its name." (*Poindexter v. Greenhow*, 114 U. S., 290.)

In a series of great decisions from *Osborne v. The United States* to *Ex parte Young*, our Supreme Court has settled beyond controversy that when the State is not an actual party to the record, and the judgment in the suit can not take the State's property or fasten liens upon it or direct the disposition of funds in its treasury, or compel the State, indirectly, by controlling its officers, to perform any contract, or pay any debt, or to govern the exercise of any discretion vested in any officer in the execution of a valid statute, the State is not a real party, and the proceedings are not held to be a suit against the State. I believe, sir, that an examination of the entire record of those delicate, yet not to be avoided, controversies between citizens asserting their rights and state officers executing

invalid legislation will show to the satisfaction of any impartial mind that the federal judiciary, in the language of the great John Marshall to the Philadelphia bar, "has never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required."

But indeed, as he also said, in an oft-quoted case, "the judiciary may not take jurisdiction if they can not, but may not avoid it if they should."

Now, sir, as industry and commerce have expanded to their present vast proportions with the growth of our common country, they have done so under the persisting and necessary assurance of speedy and secure protection to the rights of those engaged in sustaining the industry of this nation. That security is not only essential to the maintenance of their own rights and privileges, their confidence and happiness, but that of those countless thousands whose remunerative employment and consequent peace and comfort is dependent upon the continuance of every remedy, or its equivalent, essential to the protection of fundamental personal and property rights. Every day federal and state courts within their respective jurisdictions are petitioned to exercise those necessary powers with which experience makes even the laymen intelligently familiar. He relies upon their continuance, be he employer or employee, an investor or a director of investments, the head of a corporation, directing its affairs, or a workman, dependent to a large degree for steady employment upon the continued security and prosperity of his employer's business. Every day federal courts, in the exercise of their jurisdiction, are providing protection against trespass, nuisances, restraints of trade, unfair competition, infringement upon patents, copyrights, trademarks, trade symbols, and all the various devices by which rights and privileges are threatened with injury, which equity can alone prevent.

But, sir, time brings changes. As commerce and industry become more extensive and complex new occasions arise for the application of ancient remedies. Our courts present the continuous spectacle of old principles applied to new sets of facts, and while in the past the protection guaranteed in our organic law against the unauthorized interference of the people's agents with the fundamental rights of the people themselves has been continuously invoked in the course of controversies that have constantly arisen during one hundred and thirty years of national life, the more frequent exercise of the various regulative powers of the State has more frequently raised controversies between the citizens and the officers of the State in the last few years.

The volume of legislation has enormously increased in state and national legislatures. During the Sixtieth Congress approximately 40,000 bills were introduced in the House and Senate, and exclusive of private bills and resolutions 326 became laws. In 1909, 45,330 bills were introduced in the legislatures of 39 States, and 12,508 of these bills became law. In Great Britain during the same period 547 bills were introduced into Parliament and 239 enacted. Thus, in Great Britain one bill was introduced into Parliament for approximately every 77,000 inhabitants, in the United States one for every 600. Here one bill was enacted into law for practically every 6,000 inhabitants, in Great Britain one for every 175,000. Doubtless the

difference in our form of government, the complexity and extent of our industrial, commercial, political, and social activity, makes regulation more necessary here than abroad; but be that as it may, the activity of our legislatures in prescribing new rules of conduct makes it more important than ever, with all due regard and respect for their powers, that the rights of the citizen shall be carefully protected by the very system of judicial checks which he has himself prescribed. For it is but natural, in the proportionately small amount of time that can be given in our brief legislative sessions to such numerous and varied proposals, covering so many departments of activity, with which legislators can not become sufficiently familiar, that error should creep into enactments and that, in response to his honest desires, the needs of the moment, perhaps the clamors of the hour, the hurried lawmaker may fall into error of the most serious character.

If, sir, I have dwelt at length upon these considerations, aroused by a study of this measure, I do so to suggest the ground of this apprehension which rests in the mind of the business world in contemplating the very radical proposals of this measure.

I think, sir, I apprehend quite clearly your motive in presenting this bill as distinct from the purpose of the measure itself. You have stated quite clearly that you believe the resentment aroused in your State, and in other States of the Union by the decisions of federal judges invalidating an act of the state legislature, would be calmed if three judges, rather than one, made the decision. But, sir, I submit that however laudable your motive, the measure is effectuated by means subject to the most serious objection, for, first, the measure results in the most invidious discrimination against federal judges. If the bill be motivated by a desire to cause three judges to join in all decisions invalidating state legislation, the measure is most incomplete, for questions affecting the validity or constitutionality of state legislation would still be decided by one federal judge on application for writs of habeas corpus or mandate. In fact, the enforcement of this bill would present the curious spectacle of one federal judge possessing the power to invalidate an act of the state legislature, while three federal judges would be essential to protect a citizen by injunction against the enforcement of the law which one of the number might have declared unconstitutional.

If this bill were law one judge of an inferior state court could restrain a state officer in the execution of an enactment of his State; the same judge could likewise restrain the execution of the act of the Congress, while it would require three federal judges to give to a citizen of the State or of the United States the same constitutional protection given by the judge of the inferior state court. And while the single federal judge might still invalidate an act of Congress, or restrain its execution, he would be powerless to give equitable protection against the enforcement of the statute of a State, although upon its face it might not only be a plain violation of the constitutional right of the citizen, but might have been so declared by a court of the United States. For, sir, under the language of this bill, even though the legislative act of a State were invalidated by the circuit bench or by the Supreme Court of the United States itself, an attempt to enforce it at a future time, or to enforce its civil provisions if it had been invalidated upon a criminal proceeding, could not be restrained by a single federal judge.

Senator OVERMAN. Do you suppose that an attorney-general would attempt to enforce any act declared unconstitutional by a court?

Mr. EMERY. They have done so.

Senator OVERMAN. By the circuit court of the United States or the court of appeals?

Mr. EMERY. I will say that state officers have attempted to enforce the civil provisions of acts which have been declared unconstitutional in criminal proceedings. That they have revived acts remaining upon statute books but invalidated in an earlier day; and, finally, I will offer you instances where a State has persistently endeavored to enforce legislation against a particular class of persons, although its purpose and principle has been repeatedly and severely condemned in judicial proceedings. Furthermore, I submit that with human nature as it is, and the experience which we have had of the extent to which popular excitement and prejudice may find expression in, if you please, ephemeral legislation, is it wise to cripple a protective power which our past tells us is necessary and without which the future may offer unpleasant spectacles of foolish prejudice and bitter judgment expressing itself at the expense of rights left in the midst of evanescent outbursts of feeling without adequate means of protection.

Senator OVERMAN. There is no limitation in this bill on the right of injunction.

Mr. EMERY. No; but it is made more difficult of obtainment.

Senator OVERMAN. But there is nothing in this bill to prevent an injunction from being obtained?

Mr. EMERY. No; but it could be had only by complying with the provisions of this bill, and in that connection let me diverge a moment from the more fundamental objections which I am considering to call your attention to the practical difficulty of complying with its requirements.

To obtain even a temporary restraining order, it is necessary for the circuit judge to whom application is made to call two other circuit judges or a circuit and district judge to his aid. It has been suggested that the bill does not require three judges to sit together upon an application for a restraining order; that, in fact, consecutive hearings may be had, the attorney for the petitioner proceeding from one judge to the other until he secures the assent of the majority of the three. Without dealing with the obstacles this presents of securing a speedy remedy, to which a plaintiff may be entitled, I can not see how, in view of the express purpose of the bill, this interpretation can be given to its plain intent and language. The very object of the bill is to secure a meeting of three judicial minds. If this be not so, the very motive of the bill is not realized. But however that may be, the practical difficulties of obtaining the simultaneous or consecutive consent of two circuit judges and one district judge to a temporary order would, under existing circumstances, present such insuperable difficulties as to seem to amount to a practical denial of due process of law. To say the least, it is placing continuous obstacles in the pathway of the petitioner for relief and it reverses our whole theory and tendency in remedial legislation. It has been the glory of our legal system that we have sought to bring justice to the suitor's door and place at his very hand remedies required for the protection of his rights, while this measure would send the suitor rambling over circuits thousands of miles in extent in a vain endeavor to find his

remedy before the injury against which he sought protection had resulted in irreparable damage.

There are to-day some thirty circuit and eighty-odd district judges. Circuit judges are almost exclusively engaged in appellate work, and if in compliance with this measure two of them in any circuit sat in the original hearing they would by that act disqualify themselves from appellate consideration of the same case. As a matter of fact, the circuit judges rarely sit in circuit courts, and I doubt that in any city or State of the Union—other than New York—it would be possible to promptly get two circuit judges prepared to perform the duty devolving upon them under this bill. On the contrary, even in New York, they might properly be engaged in appellate duty that would prevent or greatly delay them in hearing the application for a remedy perhaps sadly needed.

To illustrate the difficulty of obtaining the assistance of the presence of circuit judges required by this bill, I need only call your attention to the following condition in the circuit courts during the calendar year of 1908: District judges held the circuit exclusively in the States of Arkansas, Colorado, Florida, Idaho, Iowa, Kansas, Kentucky, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Vermont, Wyoming, and Washington.

In the eastern and western districts of Michigan the circuit court was held by a circuit judge but one day; in Connecticut but eight days; in New Hampshire but two days; in the northern, eastern, and western districts of New York but one day; in the eastern and southern districts of Illinois, not at all.

In your own State of North Carolina there are two districts, the eastern and western. The eastern district held at Raleigh, Newbern, Wilmington, Elizabeth City, exclusively by district judges; at Washington twice by circuit judges. In the western district at Greensboro, Statesville, and Wilkesboro, exclusively by district judges.

Out of seventeen thousand nine hundred and forty-six days on which circuit court was held, district judges held the court fifteen thousand seven hundred and seventy-one days, and in 25 districts circuit judges did not hold circuit court at all.

To further illustrate the difficulties of practically complying with this bill, confine its application to, say, the ninth circuit, consisting of California, Oregon, Washington, Nevada, Idaho, Montana. A circuit judge sits in Los Angeles, San Francisco, or Portland. A suitor or his attorney in Idaho or Nevada seeking equitable relief must travel hundreds or even thousands of miles, part of the time with only primitive means of transit. If this bill were interpreted to give a right of consecutive hearings upon his application for a temporary restraint, he would visit each of these widely separated judges, or two of them, and having, after argument with each and a district judge, obtained his order he would set out again upon his long journey and begin the work of service. If it be held that the presence of three judges is required in one place, then the difficulties are multiplied beyond description. Prior claims of cases under consideration or adjudication, and the still greater difficulties that are presented when one or more judges of the circuit are ill or absent upon a vacation, make the conditions demanded for the securing of relief

almost impossible of realization. Yet, sir, in the constitution of every State of the Union you will find in the bill of rights a recognition of and a guaranty of speedy relief to the suitor in his need.

Senator OVERMAN. "Without denial or delay?"

Mr. EMERY. Yes; and you will recollect that one of the fundamental complaints of our forefathers—corrected in Magna Charta—was that the courts followed the king, and made it possible only for suitors of considerable means to travel after him and secure the king's justice. Hence it was that in the early pages of our legal system our forefathers wrote and have always maintained the means of affording justice without delay in the locality in which there is occasion to obtain it.

Now, sir, to return to more fundamental objections to the principle of this bill: I find that I can not agree that it is wise or expedient or necessary to meet any popular clamor based upon erroneous conceptions of the relations of States to the National Government by legislative discrimination against judicial officers of the United States. The constitutions of most of our States find a place in their bill of rights for a clear recognition of the superior obligation of the Constitution of the United States and the laws and treaties made thereunder. No State, sir, has more clearly and forcibly stated this principle than your own. In the constitutions of North Carolina, both that of 1868 and 1876, without change of language, I find the following splendid declaration in sections 3 and 5 in article 1 of the declaration of rights:

"SEC. 3. That the people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering and abolishing their constitution and form of government whenever it may be necessary for their safety and happiness; but every such right should be exercised in pursuance of law and consistently with the Constitution of the United States.

"SEC. 5. That every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and that no law or ordinance of the State in contravention or subversion thereof can have any binding force."

It would be difficult to more accurately express the proper relation pending between the States and the Federal Government, and no more important duty devolves upon the representatives of the people than not merely to enforce that relation, but by precept and example to give effect to these vital principles of our dual system.

Senator OVERMAN. Have you any means of ascertaining or have you ever had occasion to ascertain how many times relief has been sought against invalid state legislation?

Mr. EMERY. Do you mean in the whole course of our national life?

Senator OVERMAN. Yes; have you any idea of the number of times?

Mr. EMERY. I could not say definitely, but I feel certain I should not overestimate if I said hundreds of times.

Senator OVERMAN. It is very rare in my State.

Mr. EMERY. It has been comparatively frequent in some other States.

I noticed yesterday in an article in the American Magazine, by William Allen White, the statement was made that at the meeting

of the attorneys-general of the various States of the Union it was reported that there were 106 proceedings pending of the character we are discussing.

Senator OVERMAN. Did not the attorneys-general pass a resolution asking for some such relief as this?

Mr. EMERY. I have no recollection of a request of that character.

Senator OVERMAN. I understood they did so in convention.

Mr. EMERY. I do not know that they did; but, sir, even if they had, I submit that the people of the United States, in the language of their own Constitution, had provided against the adoption of such a suggestion by requiring that they be provided with proper protection against the invalid acts of their own agents.

Now, sir, if I may return to the point from which I was diverted, let me call to your attention that excitement, even resentment and indignation resulting from the invalidation of legislation by the courts, is by no means a new thing.

Senator OVERMAN. It is not a very common thing.

Mr. EMERY. I think I can show you, sir, that it existed during the earliest part of our national history, and even exhibited itself during the Revolution from collision between colonial courts and legislatures, and it continued sporadically up to the adoption of the Constitution and during all the early period of our national life, while our people were adjusting themselves to their new government.

It is in this connection, however, that I desire to make a clear distinction between those controversies that arose in the early part of our history between coordinate departments of the Government and those which proceed to-day between a superior and inferior jurisdiction. The question presented by controversies between colonial legislatures and their courts and between the legislative and judicial department, either of the States or of the Federal Government, were controversies between coordinate branches of the Government, and it was but natural, under a new system like ours, and in the political heat of those early times, bitter resentment should have followed the first assertion by the Supreme Court of the United States of its right in obedience to a paramount constitution to invalidate an act of Congress in conflict with the higher law. The same difficulty appears when the legislatures of the States resented the early decisions of state courts declaring unconstitutional certain legislation. But, during all of this period, the people and the States recognized and acquiesced in the right of the federal courts to invalidate the act of a state legislature in conflict with the paramount constitution.

During that period of controversy the supreme courts of the nation and the States laid down those principles upon which our dual system of government securely rests, yet bitter popular antagonism followed many of the decisions.

In *Trevett v. Weeden*, the Rhode Island supreme court, in 1780, having sustained the terms of the Rhode Island charter as against an act of the legislature, they were summoned by resolution of the Rhode Island legislature to attend "and assign the reasons and grounds of the aforesaid." In New York, in 1784, tremendous excitement was aroused by the alleged setting aside of a legislative act of the colony in the case of *Rutgers v. Waddington*, in a case in which Alexander Hamilton was attorney for the defendant. A great public meeting was held in New York and an address published to the people of the

States declaring it "absurd that there should be a power in the courts whereby they might control the supreme legislative powers."

In the preface of Chipman's Vermont Reports, the reporter writing in 1824, says of the Vermont constitution of 1777: "No idea was entertained that the judiciary had any power to inquire into the constitutionality of acts of the legislature." In 1814 the Vermont supreme court first declared an act of the state legislature void.

In Swift's "System of the Laws of Connecticut," published in 1795, the author, afterwards chief justice of the supreme court of Connecticut, argued strongly and bitterly against any power in the judiciary to invalidate a legislative enactment. As late as 1807-8 judges were impeached by the legislature of Ohio for holding acts of that body void. Cooley in his Constitutional Limitations says "there are at least two cases in American judicial history where judges have been impeached as criminals for refusing to enforce invalid legislative enactments."

Yet, sir, during all of this period when the people of the new nation were adjusting themselves to their peculiarly original scheme of government nothing akin to the plan of this bill was proposed as a means of lessening popular feeling excited in these very conflicts arising from the jealousies of coordinate authority. Mr. Justice Gibson, on the supreme bench of Pennsylvania, as late as 1825 denied the power of a state court to invalidate an act of the state legislature, because the constitution of the State did not expressly grant such power, but in the same opinion he declared his belief in the existence and necessity of the power given to courts of the United States by the second clause of article 7 of the Constitution invalidating state legislation in conflict with the paramount authority of the National Constitution.

In the constitutional convention, while there was much discussion at times as to whether or not the federal judiciary would or should possess the power to invalidate an act of Congress, the convention contains no record of any disagreement of the necessity of empowering the judiciary to invalidate state legislation in conflict with the Federal Constitution. Indeed, the records of the constitutional convention disclose a variety of measures offered to obtain this result and disagreement only as to which was the most effective means. The language of the second clause of article 6 of the Constitution displays in its original form the thought of the convention on this subject by declaring that "legislative acts of the United States and treaties are the supreme law of the respective States and bind the judges thereof as against their own laws." The committee on style of the constitutional convention changed the phrase "law of the respective States" to "law of the land."

This very brief review seems to me should be sufficient to make clear the distinction between bitterness aroused by decisions of the courts of the United States invalidating the acts of a coordinate legislature and the continuous acceptance of the necessity of vindicating the paramount authority of the National Government by invalidating state legislative acts in conflict with its superior authority. I call attention to this because it must be evident that if it is necessary to perpetuate the power to invalidate the unconstitutional acts of the State, it must be equally necessary to preserve in their fullness the

remedies essential to protect the citizen in his liberty and property against the enforcement of the invalid acts of the State. Without the preservation of a practical remedy by injunction, the State is easily the most dangerous of all trespassers with which the citizen can come in contact when its officers undertake to enforce its invalid acts. And, sir, constitutional guaranties are for the protection of minorities and individuals in the face of majorities who, by their very power, exhibit their ability to take care of themselves. Let us consider a moment the practical situation presented by the use of an injunction to restrain a state officer executing its enactment. Let it be said in the first place that federal judges have rarely used this power without confirmation of their action by the appellate court. Mr. Thom presented a strong statement on that subject, and the Supreme Court of the United States, in the case of *Ex parte Young*, with evident reference to their experience of the exercise of the injunctive power of the lower courts in these matters, said: "No injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is and will be followed by all the judges of the federal courts."

Now, sir, in a few cases where the judge may err in the issuance of his restraining order, what is the result? The injunction is dissolved on appeal and the State proceeds to enforce its law. Either bond has been given securing the recovery of any questioned tax, or in any other form of regulative legislation the State, through the machinery of its legal department, acts against the corporation or citizen and gives its will effect. The execution of the law has merely been delayed. The very legal proceedings had have made easier its future enforcement because of the judicial interpretation. On the contrary, if criminal or civil provisions of invalid legislation are enforced and property seized or persons imprisoned and then the act of the State is invalidated, the sovereign State can not be sued for the recovery of property or moneys improperly taken and the damage to injured individuals can not be recovered, as experience demonstrates by actions brought against the irresponsible officers who enforced the law. As for those persons who may have suffered imprisonment, neither the State nor individuals can restore to them the value of their lost liberty and besmirched reputation. The very range and variety of the State's activities are the best reason for retaining these equitable remedies against the errors of the State, the practical value of which experience has so keenly demonstrated.

The records of our circuit and supreme courts bear the continuous evidence of the fact that the present procedure alone can supply with speed an adequate remedy to which the citizen is entitled in the protection of personal and property rights. Take up at hazard the Federal Reporter for the past two years, run your eye over the cases in which the injunctive power has been exercised in controversies with state officers, observe the cases in which States and municipalities have attempted to evade or destroy their contracts, to violate the patent rights of individuals by infringing upon their protected ideas, of errors arising from the hasty use of the power of eminent domain, of the taxing power, of the police power, of ill-considered changes in practice and procedure, depriving suitors of their remedies and rights of action. It is true in some of these cases the acts of the State will have been tested in criminal proceedings involving writs

of habeas corpus, but, sir, if the reason for this legislation is to be found in increasing the number of the judges required to supply efficient remedies against unauthorized acts of state officers, the precedent created in this bill will soon be urgently pressed to use in other forms of procedure, and by here obstructing the pathway to the court you will have encouraged the placing of other legislative obstructions between the citizen and judicial protection.

What volumes could be written upon the splendid protection which federal courts have given against state legislation invading the most sacred privileges of the citizen under the stimulus of feeling aroused by local conditions creating prejudice against a class or a condition and drafting into legislation the excesses of local opinion against which constitutional safeguards were provided with such prophetic foresight. Observe during the early thirties of the last century that great series of cases which arose during the bad times that afflicted the then border States of Kentucky and Tennessee. They, under the pressure of local political influences, went to such limits in the protection of the debtor classes against their creditors as to again and again invalidate the obligation of contracts and subject themselves to the sharp rebuke of the Supreme Court.

I am sure you can yourself well remember in the period that followed our great civil struggle a time in which the defeated soldiers of the Confederacy and their sympathizers found themselves deprived of property and profession and almost deprived of the services and consolation of the priest of their faith in the unhappy circumstances immediately following the rebellion; when Missouri, West Virginia, and other border States, and even Congress itself, in the bitterness of the time, enacted legislation between which and its victims the federal courts stood as the sole shield between the men lately in rebellion and the destruction of their dearest rights by bills of attainder.

But, sir, I could fill volumes with the evidences of the necessity for retaining in its fullness this great power that can alone successfully protect the citizen against the errors and mistakes of hasty, ill-considered, or prejudiced legislation.

Let me give you two more practical examples from the many that could be adduced, and I shall conclude. The first illustrates the extremities into which a State can readily force property rights; the second will illustrate the persistency with which a prevailing local opinion will seek to invade through legislation the rights of an alien minority, finding their sole protection in the federal courts against bitter racial agitation. In 1875 a statute of the State of New York, and a somewhat similar one in Louisiana, were brought to the attention of the United States Supreme Court in the case of *Henderson v. The Mayor of New York* (92 U. S.). At about the same time there a similar action was instituted by the North German Lloyd Steamship Company against a Louisiana official and decided substantially in the same case. The New York statute provided that any steamer arriving in New York must, before discharging its passengers, supply the mayor of that city with certain information in regard to all of them, and, through its master, must give for each alien landed a bond in favor of the mayor of New York for the sum of \$400, the bond to have two good and sufficient sureties to guarantee against the alien landed becoming a public charge on the State. The filing of the bond could

be avoided by paying \$1.50 head tax to the State of New York. For failure to comply with this act a penalty of \$500 was assessed against the vessel for each alien landed. The board of immigration commissioners of the State, subject to the order of the mayor, were authorized to bring an action for the recovery of the penalties, which were made a lien against the vessel.

In the Henderson case a vessel with 400 or 500 passengers subject to these penalties failed to comply with the law, and as the immigration commissioners were about to begin an action for the collection of approximately \$250,000 penalties involved, the shipowners enjoined the mayor and commissioners, through the circuit court of the United States, from beginning the action, on the ground of the invalidity of the law, and the Supreme Court of the United States, to which it went on appeal, declared the act unconstitutional, as an attempt on the part of the State of New York to regulate interstate commerce.

Had it not been possible to protect the shipowners in this case against the beginning of an action which might have held his ship in port and deprived the owners of its use, it is evident that irreparable damage would have been suffered of a nature and extent so serious as to require no amplification.

Referring now to the second instance suggested, I have no doubt, sir, that you are familiar in a general way with the history of the agitation against the Chinese in the State of California. It had grown so strong in the middle of the seventies that language was expressly placed in the new constitution of the State for the purpose of depriving Chinese of opportunity for employment. You will find the condition very clearly outlined in the case of *In re Tiburcio Parrott* (1 Fed., 484). This was an application for writ of habeas corpus by the president of a mining corporation, one Parrott, who had been arrested and charged with the violation of section 179 of the penal code of the State, which read as follows:

“Any corporation now existing or hereafter to be formed under the laws of this State that shall employ, directly or indirectly, in any capacity, any Chinese or Mongolian shall be guilty of a misdemeanor, and upon conviction thereof shall for the first offense be fined not less than five hundred dollars nor more than five thousand dollars; and upon the second conviction shall, in addition to said penalty, forfeit its charter and franchise and all its corporate rights and privileges, and it shall be the duty of the attorney-general to take the necessary steps to enforce such forfeiture. This act shall take effect immediately.”

This penal provision had been enacted to enforce a provision of the new state constitution requiring that corporations created under the laws of the State should not employ Chinese persons. There were at the time some 8,000 corporations in the State, and Chinese were extensively employed in a variety of capacities, and their rights in regard to residence and employment were fixed by the Burlingame treaty between this country and China. Comment seems to be unnecessary with regard to this legislation, and I shall only quote from a portion of the opinion of the court in granting the application for the writ and discharging Parrott:

“It applies to all corporations formed under the laws of this State. If its provisions be enforced, a bank or a railroad company will lose

the right to employ a Chinese interpreter to enable it to communicate with Chinese with whom it does business. A hospital association would be unable to employ a Chinese servant to make known or administer to the wants of a Chinese patient, and even a society for the conversion of the heathen would not be allowed to employ a Chinese convert to interpret the gospel to Chinese neophytes."

But despite this decision the prejudice against the Chinese not only continued to exist, but to evidence itself by continuous attempts expressed in state and municipal legislation to discriminate against the Chinese residents in such a way as to force them to withdraw from the State, and that, you will observe, in the face of the clearest of treaty obligations. In the case *In re Lee Sing* (43 Fed., 361) you will perceive a further effort of this character in an endeavor to require by ordinance that all Chinese should live and do business in a certain restricted section of the city of San Francisco, it being made a misdemeanor for them to reside or do business elsewhere within the municipality. The effects of this legislation were thus described by the circuit judge in causing the discharge of Lee Sing from custody:

"The obvious purpose of this order is to forcibly drive out a whole community of twenty-odd thousand people, old and young, male and female, citizens of the United States, born on the soil, and foreigners of the Chinese race, moral and immoral, good, bad, and indifferent, from a whole section of the city which they have inhabited, and in which they have carried on all kinds of business appropriate to a city, mercantile, manufacturing, and otherwise, for more than forty years. Many of them were born there, in their own houses, and are citizens of the United States entitled to all the rights and privileges under the Constitution and laws of the United States that are lawfully enjoyed by any other citizen of the United States."

Soon after this litigation an attempt was made to lodge in the board of supervisors of San Francisco a certain police power obviously intended to be enforced with discrimination. The city of San Francisco enacted an ordinance requiring that no laundry should be conducted in a frame building without a permit from the board of supervisors. Upon the admitted state of facts, it was shown to the court that of 320 laundries in the city—a city, it is to be remembered, then practically of wooden structures—260 laundries were conducted by Chinese. It was admitted that practically all the white laundries were given permits to conduct their business in wooden structures, while the same privilege was universally denied to the Chinese. Thus you perceive an endeavor was made to provide an exercise of the police power that would be valid upon its face but discriminating in its enforcement. Nearly all the Chinese conducting laundries in the city of San Francisco were arrested under this ordinance. On an application for writ of habeas corpus to the supreme court of California the ordinance was sustained and the case went to the Supreme Court of the United States on writ of error. *Yick Wo v. Hopkins, sheriff* (118 U. S., 356), and was there invalidated as a discriminating enforcement of police power in denial of treaty rights.

Thus, sir, you perceive during a period of years a continuous attempt, because of strong local feeling, to destroy by ingenious legislative devices the treaty rights of a body of alien people. Very recently cases arose in the State of California because of like feeling against the Japanese, and you will recollect that it was for a time

feared that our peaceful relations with the Japanese Empire would be disturbed, and our Government itself appeared by counsel in proceedings taken to vindicate the treaty rights of the Japanese. In all of these cases, particularly in the attack upon corporations of the State of California, employing Chinese, the forfeiture of corporate privileges and franchises would have damaged the property interests of their stockholders beyond computation, and had the attack upon the corporate rights of franchise holders taken a civil form, the injunctive processes of the federal courts would have alone supplied efficient protection. The evident influence exerted upon the state courts by the condition of popular feeling was evidenced in the various proceedings which went to the Supreme Court of the United States after denial of relief in the state supreme court, and thus, sir, we are presented with the most striking example of the absolute, practical necessity of retaining this necessary equitable power for the protection of the citizen and the preservation of treaty rights of aliens, who, if in any period of popular excitement based upon racial prejudice, were made in their persons or property the victims of antagonistic state legislation, might be the means of forcing us into disastrous complications with foreign powers, if it did not bring us to the very verge of war.

Finally, sir, let me ask you to consider that the right of equitable relief is just as sacred as the right of legal relief, that prevention of injury is more important than compensation for it, and that the attack upon person and property by the officer of a State possessing no valid authority for his action but having behind him the tremendous machinery of a sovereign power, is a far more serious assailant than any man or combination of men against whose assaults you intend to retain for the citizen the full equity power of intervention as it at present exists.

In cases that have arisen in our States from time to time effort has been made to impair the equity power through alleged efforts to regulate procedure which had the effect of invading and impairing the judicial power itself. In Wisconsin, Virginia, Mississippi, Arkansas, Michigan, and other States attempts have been made to compel a chancellor sitting in equity to accept the verdict of his advisory jury, to compel a court of equity to refrain from enforcing its orders and decrees in a proceeding for contempt until a jury had determined whether or not the contemnor be guilty of the violation of a judicial order charged. In all of these and similar cases courts have called our attention to the fact that the courts are alone the home of the judicial power, that courts possess powers which no legislature gave them and which no legislature can take from them, and as the supreme court of Michigan said in the case of *Kalamazoo v. Circuit Judge* (75 Mich.): "The right to have equity controversies tried by equity methods is as sacred as the right of trial by jury."

I do not intend here and now at this late hour to enter into any technical discussion as to whether or not this bill under some interpretations given to it amounts to an attempt to create three courts in requiring the consecutive judgment of three chancellors upon an allegation of threatened irreparable damage in a petition for injunctive relief, or whether a bill which would prevent a chancellor sitting in equity from issuing a temporary order to restrain the enforcement

of a statute which has been held by another court to be invalid or which is invalid on its face and threatens by its enforcement to work irreparable damage, is not in itself a denial of due process of law.

Senator OVERMAN. Has not Congress a right to deprive any of these courts outside of the Supreme Court of its equitable jurisdiction?

Mr. EMERY. It may deprive the court of jurisdiction, but it can not give it jurisdiction and at the same time deprive it of the essence of the judicial power in equity.

Senator OVERMAN. But these courts are the creatures of Congress, and Congress can abolish them.

Mr. EMERY. It is within the power of Congress "to ordain and establish" inferior courts, but their judicial power does not proceed from Congress, which merely defines their jurisdiction. In the sense that Congress provides the instrumentality for the exercise of the judicial power, it established the Supreme Court itself, because it not only named the number of judges which should constitute it, but supplied all the machinery through which they exercise their power.

Senator OVERMAN. You know we have created some courts here in Washington.

Mr. EMERY. Yes, but those are statutory courts in which the sovereign has permitted itself to be sued, and they derive their authority for the exercise of their powers from the statute of Congress creating them, and not from the Constitution of the United States.

Senator OVERMAN. When I introduced my amendment to the rate bill, we had that question of jurisdiction up—the question of requiring notice—and I thought I would like to hear your view of it.

Mr. EMERY. You refer to the Spooner-Bailey controversy?

Senator OVERMAN. Yes.

Mr. EMERY. You will recollect the *State of Pennsylvania v. The Wheeling and West Virginia Bridge Company* (13 How.). In that decision the Supreme Court defined the source and nature of the equity powers of the courts of the United States, declaring the equity power and jurisdiction to be such as was exercised by the high courts of chancery of England at the time of the adoption of the Constitution. This, said the court, may be called the "common law of equity," and you will recollect in that case that without any statutory authority the court took chancery jurisdiction and issued the injunction requested.

Senator OVERMAN. You say the equity power is conferred upon the United States courts?

Mr. EMERY. Yes; by the Constitution.

Senator OVERMAN. By the statute?

Mr. EMERY. No. The constitutional provision is that the judicial powers of the United States are lodged in the Supreme Court and such inferior courts as Congress "may ordain and establish."

Senator OVERMAN. That gives them equitable jurisdiction?

Mr. EMERY. I am distinguishing constitutional courts from statutory courts.

Senator OVERMAN. Is not every court a statutory court?

Mr. EMERY. In the sense that every inferior federal court has been established by an act of Congress it derives jurisdiction from the

statute establishing it, but the judicial power which it exercises within the jurisdiction defined flows from the Constitution and not from Congress.

Senator OVERMAN. Pardon me for interrupting you?

Mr. EMERY. Certainly. I am glad of any interruption that clarifies this discussion.

Senator OVERMAN. There are numerous decisions, are there not, in which the courts say that Congress has the right to limit jurisdiction?

Mr. EMERY. Certainly; but Congress may not invade the judicial power itself, and while it may be difficult to fix the exact limits within which Congress may exercise its power to fix procedure, it must be certain that any attempt ostensibly to regulate procedure which is intended, or has the effect, of impairing or damaging or trespassing upon or destroying the judicial power itself will be ipso facto invalid. You are, of course, familiar with the numerous cases in which a legislative act has been invalidated because of its invasion of the executive power on the one hand, or that of the judiciary on the other.

Senator OVERMAN. I think these powers should be preserved intact, but it is my own opinion that Congress has the power to limit the courts.

Mr. EMERY. I quite agree with you, sir, to the point where a regulation of procedure becomes a trespass upon the judicial power; but, sir, even if it be granted that you possess the power to enact the present legislation, let me call your attention to the fact that nowhere in the history of the legislation of this country or that of England has any attempt ever been made to throw such an obstruction as this in the pathway of equity intervention. On the contrary, it has been our constant endeavor to remove obstructions from the progress of the suitor seeking his remedy. The tendency of legislative opinion and action has been to make the courts easy of access and to preserve, by every remedy, the rights of the citizen against trespass from every direction. Our Constitution, with its delicate system of checks and balances, was created by a people jealous of their individual rights, who sought not only to preserve a just balance of power between national and local governments, but to provide themselves with that which existed in no other nation in the history of government, a judicial power able to protect the rights of the citizen against the exactions of government, not only against tyranny and usurpation of authority, but against the errors and well-intentioned mistakes of legislators, and experience has demonstrated that judicial intervention through the equity power has given efficient protection, and the only efficient protection obtainable, against trespass of the character indicated, and that, moreover, it is the safest, as it is the surest and least likely to be disturbed, check against the excitements of a local character, which are likely, under stress of intense feeling, to express themselves through political pressure brought in times of extreme local agitation to bear upon the legislatures of municipalities or States.

Finally, sir, our whole theory of government rests for its successful perpetuation upon the preservation of the paramount authority of the Constitution over the action of the States. The vindication of that wonderful relationship is essential to the maintenance of our institutions. No act of Congress should give our people cause to regard our national courts as less the courts of the people than those of the States. No example here set should make them feel that the

Constitution and laws of the United States are any less their laws than the statutes of their respective States. As Justice Bradley finely put it in the conclusion of his great opinion in the case of *Ex parte Siebold* (100 U. S., 398), in meeting the very contention that supplies the philosophy beneath the resentment expressed against federal judicial invalidation of unconstitutional state legislation: "The doctrine laid down at the close of counsel's brief that the State and National Governments are coordinate and altogether equal, on which this whole argument indeed is based, are only partially true.

"The true doctrine, as we perceive, is this: That while the States are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Constitution and constitutional laws of the latter are, as we have already said, the supreme law of the land; and when they conflict with the laws of the State, they are of paramount authority and obligation. This is the fundamental principle on which the authority of the Constitution is based, and unless it be conceded in practice as well as in theory, the fabric of our institutions, as was contemplated by the founders, can not stand. The questions involved have respect not more to the autonomy and existence of the State than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land."

#### ARGUMENT OF HON. DANIEL DAVENPORT, OF BRIDGEPORT, CONN.

MR. DAVENPORT. In order that the provisions of the proposed bill may be fresh in our minds during the discussion, I will read it, as it is quite short.

A BILL Regulating injunctions and the practice of the district and circuit courts of the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That no temporary or interlocutory injunction or temporary restraining order, or decree suspending or restraining the action of any officer of such State in the enforcement or execution of such statute, shall be issued or granted by any circuit or district court of the United States or by any judge or justice thereof upon the ground of unconstitutionality of the statute, unless the application for the same shall be presented to a circuit judge and shall be heard and determined, upon issue made and proof taken by affidavit or otherwise, by three judges, of whom two shall be circuit judges, and the third may be either a circuit or a district judge, and unless a majority of said three judges shall concur in granting such application. Whenever such application, as aforesaid, is presented to a circuit judge he shall immediately call to his assistance, to hear and determine the application, one circuit judge and one district judge or another circuit judge. Said application shall not be heard and determined until five days' notice of the hearing has been given to the governor and attorney-general of the State and such other persons as may be defendants in the suit: *Provided*, That if a majority of said judges are of the opinion, at the time notice of said hearing is given as aforesaid, that irreparable loss and damage would result to the applicant unless a temporary restraining order, pending the period of the required notice, is granted, a majority of said judges

may grant such order, but the same shall only remain in force until the hearing and determination of the application, upon due notice as aforesaid, has taken place; that an appeal may be taken directly to the Supreme Court of the United States from any order or decree granting or denying, after notice of hearing, a temporary or interlocutory injunction or restraining order in such case, and the hearing of such appeal shall take precedence over all other cases except those of a similar character and criminal cases.

It does not require an extensive knowledge of the judicial system of the United States to perceive that the obstacles to the issuance of temporary restraining orders and preliminary injunctions contemplated in this bill amount practically to the total deprivation of the preliminary injunctive remedy as a means to preserve the status quo in all cases brought to the circuit and district courts of the United States which require in any way a temporary restraint on the enforcement, operation, or execution by state officers of any state statute, however clear its invalidity may be or appear, by reason of its conflict with either the federal or state constitution. The federal judges are so few in number, so widely separated, and so fully occupied with the responsible duties of their office, that it is idle to expect that they can be got together in sufficient number, or soon enough, to afford that urgent preliminary relief, which is only to be granted by courts of equity in cases of pressing emergency and of immediately threatened and irreparable damage.

The bill has certain peculiarities which at once arrest the attention. While it leaves the equity courts of 46 States with untrammelled power to stay temporarily the operation or execution of a state law by state officers, on the ground of its conflict with either the state or national constitution, it practically deprives the federal courts of that power. And while the state and federal courts are both to be allowed to stay temporarily the operation of an act of Congress enacted by the representatives of the whole people, if unconstitutional, the federal courts are to be deprived practically of the power to suspend temporarily the execution by a state officer of a state statute, enacted by the representatives of only a small part of the people on the ground of its unconstitutionality. And this, too, even though the state law and others just like it have already been declared void by the United States Supreme Court. This is truly a remarkable proposition. It indicates a degree of faith in the impecability and sanctity of state legislation greatly in contrast with that of the people who established the Constitution of the United States for their own protection and benefit. For one of the most noticeable things about that Constitution is the consciousness it displays, in every part, of the people of the whole country that the legislatures of the several States would be constantly passing all sorts of laws, which would be in conflict with it and with the real interests and rights of the nation and its citizens. To guard against this all sorts of restrictions, both express and implied, were placed upon state legislation. For instance, they were forbidden to grant titles of nobility, coin money, omit bills of credit, make anything but gold or silver a legal tender in payment of debts, impose duties on imports and exports, pass bills of attainder, ex post facto laws, or laws impairing the obligation of contracts, or to regulate interstate or foreign commerce by taxation or otherwise, or to

tax or otherwise obstruct the agencies and operations of the National Government, or to deprive any person of life, liberty, or property without due process of law, or to deny any person the equal protection of the laws. And in order that these restrictions might be made effectual, the Constitution and laws of the United States were made the supreme law of the land, and even the judges of the state courts were to be bound thereby, and a federal judiciary was provided.

The very proposition that the Federal Government shall deprive suitors in its courts of this familiar and oftentimes only means of protection from irreparable injury, seems strange to one who believes in the principle laid down by Chief Justice Marshall in *Marbury v. Madison* (1 Cranch, 137), and sanctioned by all the great law writers before him and since, that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection."

I shall not, however, further enlarge upon that aspect of the matter. Perhaps it has been urged upon your attention by others. Indeed it is only too plainly apparent from the terms of the bill itself. What I desire to do, rather, is to point out to you the tremendous scope of the prohibitions of the bill, and their crippling effect upon the necessary functions of the federal judiciary, as an indispensable branch of the Federal Government, and an intimate part of the judicial system of the whole country.

It is a principle of constitutional construction, laid down by Chief Justice Marshall in *Sturges v. Crowninshield* (4 Wheat., 72), that "whenever the terms in which a power is granted to Congress, or the nature of the power require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it."

In conformity with this principle it was long since decided in *Martin v. Hunter's Lessee* (1 Wheat., 304) and in *The Moses Taylor* (4 Wall., 411) that Congress has power to divest the courts of the States of jurisdiction over all subject-matters which are included within the constitutional grant of judicial power to the United States, or whose determination by the judicial power of the United States is necessary to the exercise by Congress of its constitutional power of legislation, and where Congress has expressed its will that, as to any particular subject-matter of federal cognizance, the jurisdiction of the courts of the United States shall be exclusive, the courts of the States can not take cognizance of such subject-matter. Of course, the Constitution having granted the power, and not having commanded Congress to exercise it, it is for Congress to determine when and to what extent it will exercise it. Therefore, the jurisdiction of the courts of the United States within the limits imposed by the Constitution, is either exclusive of or concurrent with that of the courts of the States, as Congress may from time to time determine.

Now, Congress has seen fit in its wisdom wholly to withdraw from the cognizance of the state courts and to vest exclusively in the federal courts jurisdiction over many subjects, including suits for penalties and forfeitures incurred under the laws of the United States; civil causes of admiralty and maritime jurisdiction; seizures under the laws of the United States on land or on waters not within admiralty or

maritime jurisdiction; cases arising under the patent-right or copyright laws of the United States; all matters in proceedings in bankruptcy; all controversies of a civil nature, where a State is a party, except between a State and its citizens, or between a State and citizens of other States or aliens; and all suits or proceedings against ambassadors, or public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls.

When Congress thus expressed its will that the courts of the United States should exercise exclusive jurisdiction over these subject-matters, which are included within the constitutional grant of judicial power to the United States, the courts of the States could not thereafter directly exercise jurisdiction over them, though they might indirectly and collaterally act upon them in a way.

Under this principle a state court can not take jurisdiction of a cause of admiralty cognizance, such as a proceeding in rem founded upon a contract for the transportation of passengers by sea, or upon a collision, or upon a contract of affreightment. A state court can not take jurisdiction of an action against a foreign consul. It can not take jurisdiction in patent causes, nor determine the validity of a patent or a question of infringement. The courts of the States can not issue injunctions before final decree, nor attachments on mesne process, against a national bank. A state court can not issue a mandamus to an officer of the United States, or try a federal officer for an act done by him in the discharge of his official duties, or by its process take in execution goods imported into a port of the United States, but not yet entered at the custom-house, for payment of duties to the United States, or goods which, having been seized for violation of the revenue laws of the United States, are in the custody of a marshal of the United States. Nor can a state court take jurisdiction of a suit to determine whether or not property has been rightfully forfeited under the laws of the United States, nor can it by injunction restrain the execution of a judgment of a court of the United States. A state court can not, under a state insolvent law, regulate the distribution of an insolvent national bank, or discharge a defendant held in custody under a *capias ad satisfaciendum* issued by a court of the United States, or replevin property taken in execution under a judgment of a court of the United States. Nor can attachment of a debt by the process of a state court, after the commencement of suit upon that debt in a court of the United States, bar the plaintiff's recovery in that suit; nor can the pendency of state insolvent proceedings be set up as a bar to suits in courts of the United States brought by parties who are constitutionally entitled to sue therein.

There is scarcely one of the above-named subjects of the exclusive jurisdiction of the federal courts in regard to which, at one time or another, void state statutes have not been enacted, and may not again be enacted, the immediate enforcement of which without temporary restraint would have worked irreparable injury to persons entitled to be protected therefrom. So it must be apparent to all that, throughout this vast field of litigation, thus wholly withdrawn by Congress from the state courts and vested in the federal courts the provisions of this bill would practically destroy the power of the circuit and district courts of the United States to preliminarily preserve the status quo of the subject-matter of the litigation whenever it was threatened by the

enforcement, operation, or execution of an unconstitutional state statute by a state officer; and since Congress has deprived the state courts of jurisdiction over such matters, the practical result of this bill in that respect would be to expose all the public and private interests of the people to the lawless action of state officers assuming to act under void laws of a state. The deplorable consequences of such a situation is apparent to everyone. The history of our country from 1789 to the present time is replete with instances where the most serious consequences to individuals as well as the public would have followed had not the federal courts possessed and exercised promptly the preliminary injunctive power which, under our system of laws, was vested nowhere else, and which it is the effect if not the purpose of this bill to destroy.

Moreover, the Constitution extends the judicial power of the United States "to controversies to which the United States shall be a party." Heretofore the United States has always possessed the power, whenever it found it necessary, to appear in its own courts and apply for and obtain the untrammelled aid of those courts by peaceful preliminary injunctions, to enable it to carry on its great operations in the public interest and for the public welfare, without resorting to the use of that force which it undoubtedly possesses. Speaking of the wisdom of this course, as pursued on a momentous occasion, the Supreme Court said in *In re Debs* Petitioner (158 U. S., 598), "the outcome attests the wisdom of the course pursued by the Government, and that it was well not to oppose force simply by force, but to invoke the jurisdiction and judgment of those tribunals to whom by the Constitution and the settled convictions of all citizens is committed the determination of questions of right and wrong between individuals, masses, and States." Much more is this true, if by resort to this peaceful temporary preventive remedy collisions between the representatives of the States and the nation may be avoided.

But if this bill passes, the Government will be deprived, practically, of that peaceful remedy in any case, however important it may be, where its interests, rights, and duties, and the national welfare are imperiled by a threatened immediate enforcement of a void state statute by an irresponsible state officer. The language of Chief Justice Marshall in *Osborne v. Bank of United States* (9 Wheat., 738) seems here peculiarly in point. Speaking of the denial of the constitutional power of federal courts, by a preliminary injunction, to stay the levy of a void state tax by a state auditor, that great jurist said:

"A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to all cases perfectly clear in themselves; the cases where the Government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law, void in itself because repugnant to the Constitution, may arrest the execution of any law in the United States. It maintains that if a State shall impose a fine on any person employed in the execution of any law of the United States it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts, and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the Government. The carrier of the mail, the collector of the revenue, the mar-

shal of a district, the recruiting officer, may all be inhibited under ruinous penalties from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duties may indeed resort to his action for damages, after the infliction of the injury, but can not avail himself of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual from the inability of the agent to make compensation."

The deplorable consequences thus asserted by the great Chief Justice to be the result of a successful denial of the power of Congress under the Constitution to vest the preliminary injunctive power in the federal courts would equally follow in the train of a voluntary surrender of it.

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